UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-02311 Hon. Marianne O. Battani
IN RE: All Wire Harness Cases and Anti-Vibration Rubber Parts	

FAIRNESS HEARING & MOTION TO DISMISS

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Tuesday, August 8, 2017

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Detroit, Michigan

Tuesday, August 8, 2017

at about 10:04 a.m.

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(Court and Counsel present.)

THE CASE MANAGER: All rise.

The United States District Court for the Eastern District of Michigan is now in session. The Honorable Marianne O. Battani presiding.

Please be seated.

The Court calls Case No. 12-101 and 14-13773, In Re: Wire Harness, direct purchasers.

THE COURT: Good morning.

THE ATTORNEYS: (Collectively) Good morning, Your Honor.

THE COURT: All right. The first motion we have is the attorney fees. Do you want to do the other one?

MR. KANNER: Well, Your Honor, I just thought we should --

THE COURT: Do the fairness hearing first?

MR. KANNER: -- put the horse before the cart.

THE COURT: I forgot about the fairness hearing.

MR. KANNER: Okay. We will do it quickly.

THE COURT: Okay.

MR. KANNER: Good morning, Your Honor.

Steve Kanner from the Freed, Kanner, London & Millen firm, on behalf of direct-purchaser plaintiffs.

Before we start there is a small but not insignificant housekeeping matter I wanted to bring to the attention of the Court. Last -- well, sometime yesterday, I'm not sure exactly what time, Your Honor, we filed the settlement class counsel report of distribution of settlement funds in the OSS case, the occupant safety system case.

THE COURT: Just one minute while I pull that up. Thank you.

MR. KANNER: I'm pleased to inform the Court that all of the checks that were made in payment of claims have been now cashed including --

THE COURT: Really, all of them?

MR. KANNER: Including the last one for $4.

THE COURT: Okay.

MR. KANNER: The total amount of those checks was $28,272,586.86.

THE COURT: I guess the direct purchasers are a much more manageable group.

MR. KANNER: There is that reality, but I thought it was important for Your Honor to know that those funds are paid. And one of the things that we will be talking about today is our plan of allocation for the funds in this case, and perhaps I can start off by saying on today's agenda, at

least insofar as I'm going to handle, we are here for final approval for your determination of whether these cases are appropriate for final approval on five wire harness settlements, and it is my pleasure to address the Court with respect to those matters and those which naturally flow from the final approval of the settlements, that would include the proposed order and final judgment releasing the defendants and an order approving the proposed plan for distribution.

THE COURT: Okay. And that order is to release the defendants at this time, not waiting as we have in others?

MR. KANNER: Exactly. And if Your Honor deems appropriate to grant final approval on those settlements, those five settlements, my colleague, Greg Hansel, seated at the table, will present the purchaser plaintiffs' motion for award of attorney fees, litigation costs, expenses, and requests for incentive awards for the class representatives.

THE COURT: Okay. And before you continue, Mr. Kanner, I think I would like to have the appearances of the rest on the record so I know who is seated out here.

MR. KANNER: Certainly, Your Honor.

MR. FINK: David Fink appearing on behalf of the direct-purchaser plaintiffs.

MR. HANSEL: Good morning, Your Honor. Greg Hansel for the direct-purchaser plaintiffs.

MR. SPECTOR: Good morning, Your Honor.

Eugene Spector on behalf of direct-purchaser plaintiffs.

MR. KOHN: Good morning, Your Honor. Joseph Kohn for direct purchaser.

MR. KANNER: And I think I have already introduced myself for the record, Your Honor.

THE COURT: Now the other side.

MS. SULLIVAN: Good morning, Your Honor. Marguerite Sullivan on behalf of the Sumitomo defendants.

MS. HAVSTAD: Good morning. Megan Havstad on behalf of the Leoni defendants.

MR. TROTTER: Good morning, Your Honor. Zach Trotter on behalf of the Yazaki defendants.

MR. RUBIN: Good morning, Your Honor. Mike Rubin on behalf of the Fujikura defendants.

THE COURT: And I have one more, David Giardina?

MR. GIARDINA: Yes, Your Honor. That's actually for the next motion.

THE COURT: For the next case. Okay. All right.

MR. KANNER: Thank you, Your Honor.

THE COURT: You may proceed.

MR. KANNER: So as I mentioned today, we are going to talk about the settlements with Chiyoda, Fujikura, Leoni, Sumitomo, and the Yazaki defendants. And, of course, their names are more fully set forth in the pleadings, there are various entities, but for the purposes of today's hearing I'm

simply going to refer to them that way if it is all right with the Court?

I would also like to ask your indulgence in terms of addressing these settlements collectively simply because their -- the basis for approval is identical on each settlement, the settlements are -- while they are of different amounts, they are essentially the same; there is consideration by way of dollars paid to the class and cooperation, and I think it would be efficient time-wise if I go through them collectively.

THE COURT: I think that's --

MR. KANNER: Unless you have individual questions.

THE COURT: Yes, I think that's a great idea.

MR. KANNER: Great. I had a feeling that would be the case but I thought it would be better to ask first.

So a little bit of the history on the litigation, if I can for the record. The Court appointed the four firms identifying themselves a moment ago at counsels' table as interim co-lead counsel for the direct purchaser class, and Mr. Fink's firm as liaison counsel back in March of 2012. The cases were filed, as I recall, late I believe December of 2011. So we have run the course certainly with the wire harness case.

Your Honor consolidated the matter in the spring of that year, and the first consolidated complaint -- the first

of several was filed in May of 2012.

The defendants filed -- multiple defendants filed motions to dismiss in July of 2012, and I believe those motions were all subsequently denied in June of 2013.

As the Court knows, the first of the settlements introduced in this case was that with Lear Corporation for 4.75 million which Your Honor granted final approval of in January of 2014.

In April and July of 2014 we reached several other settlements with smaller defendants; GS Electech for 3.1 million, 800,000 with Tokai Rika, and Your Honor granted final approval to those settlements in February of this year.

The direct-purchaser plaintiffs then reached a settlement with the Fujikura defendants in November of 2016 in the amount of $9.5 million, and in the ensuing months we negotiated additional settlements with Yazaki for $212 million, Sumitomo for $25 million, Leoni for $1 million, and Chiyoda for $1.15 million.

In each of the settlements the defendants agreed to cooperate with the direct-purchaser plaintiffs in our efforts to further prosecute the case which included document production, attorney proffers, and access to witnesses along with those witnesses potential testimony at trial.

Your Honor granted our motions for preliminary approval of these five settlements in October, I believe

October 21st of 2016.

And the last bit of news in terms of the history, I would report to the Court in the past few months that the direct-purchaser plaintiffs have reached an agreement in principle with the MELCO defendants, and that's a total of, I believe, seven cases, one of which is wire harness which is why I am mentioning it today. I think we have worked out most of the details, and the settlement papers should be prepared, it is my earnest hope that we have them here by the next status hearing, so that would be a total of seven additional cases, one wire harness case and six additional product cases.

With those -- with the settlement which should be forthcoming from MELCO, we have only two defendants left in the wire harness case, one with a rather small market share, and that is Denso, at least the small market share with respect to wire harness, not in other products, and the other with a more significant -- much more significant market share, and that would be Furukawa.

THE COURT: It would be what?

MR. KANNER: Furukawa. I think from a capsule of history that brings us up to the current time, Your Honor.

With respect to the agreements, certainly they are very typical in many respects but I do want to address something up front and make sure it is clear. As Your Honor

is aware, several of those settlements were made subject to certain conditions which provided that the value of a given settlement could be reduced by a proportionate share of certain OEMs opting out, or ultimately what is more typical a cap -- I'm sorry, what is known as a blow provision, in other words, they could be rescinded if X percent of the class opted out. Two of those -- two of the smaller settlements have that provision. Neither of those caps have been reached with respect to opt-outs so those settlements will go as in. With respect to the other three I will address those and give you the details. And I would also add that the relation -- the specific details of those is listed on Exhibits 2 and 3 to the dissemination of proposed settlement reports with Chiyoda, Fujikura, Leoni, Sumitomo, and Yazaki. Our brief in support of final approval describes in detail those settlements that are subject to the reduction, and those would be Fujikura, Sumitomo, and Yazaki.

I would also add that the notices that went out, and we will talk about the service of those notices, also includes this information.

So the total face value of the settlements before Your Honor today is $249,151,000. When combined with the earlier settlements, that total is $257,801,000. The total settlement value of these five settlements after reduction for OEM opt-outs is 94.086 million. When adding to the value

of the earlier settlements, what we are talking about today in terms of total value of the settlements to date are $102,736,000.

We believe, Your Honor, and I'm not going to reiterate what's in the briefs, but we firmly believe that the settlement requirements for being fair, reasonable, and adequate are met in this case. They were obtained through diligence and hard work by counsel on both sides of the equation -- of the table rather.

Each case the negotiations were arm's length by experienced counsel who made decisions recognizing the inherent uncertainties of both law and facts with the related risks and costs of what is clearly highly complex litigation.

Plaintiffs' counsel determined in each of these five cases that the dollar value coupled with the cooperation element, provided ample justification and consideration to enter the settlements. In the course of the litigation over ten million independent documents from both the defendants, primarily the defendants, many of which were in Japanese, and the class representatives were reviewed and analyzed.

The direct-purchaser plaintiffs sometimes on our own, occasionally working with the end-payor groups and the auto-dealer groups, took over 50 depositions in this case, many of which required the use of Japanese interpreters. Add to those another 10 to 12 depositions by defendants of our

class representatives, most of which were multi-day processes. You are looking at over 60 some odd depositions.

As Your Honor knows, the wire harness cases saw an extremely active motions practice earlier in the case, and that was a significant expenditure of time and effort on both sides. When the time was right after discovery in the course of depositions we had extensive multiple discussions with defense counsel regarding the possibility of settlement and all of those which led to where we are today.

The cooperation element is important in that the direct-purchaser group will continue to prosecute these cases diligently against the remaining two defendants.

Accordingly, we think it is fair for Your Honor to conclude that counsels' decision to reach these settlements on those bases was fair.

With respect to the notice, following preliminary approval and pursuant to the notice dissemination order Your Honor entered on May 19th of 2017, 7,472 individual copies of the notice of proposed settlement were mailed to all potential settlement class members identified by the defendants' own records. In addition, a summary notice of proposed settlement with today's hearing date was published in one edition of the Automotive News on May 29th of this year, and in the national edition of the Wall Street Journal the following day. Copies of the notice were and are

currently posted online at the autopartsantitrustlitigation.com website. The declaration of Nicole Hammond, who is the managing director of Epic Class Action and Claims Solution, is attached as Exhibit 1 to settlement counsels' report on dissemination of notice of proposed settlements, and that reflects that as of July 14th of this year there were at least 3,803 page views to the settlement website and 958 unique visits to the wire harness settlement section.

Finally, counsel for each of the settling defendants today have advised us that they have fulfilled their respective obligations under the class action fairness act, and they disseminated the requisite notices to the appropriate federal and state officials. I can go through the dates, I don't think it is necessary.

THE COURT: No.

MR. KANNER: But each one has verified that has taken place.

So as to the actual consideration for the settlement, there are two factors as I mentioned earlier, the amounts that each defendant paid and the cooperation element from both defendants. The nature and the extent of both of those elements are discussed in our moving papers and included in each of the respective settlement agreements.

Let's talk for a moment about the request for

exclusion from the class. As the Court knows, the largest members of the class are the OEMs, and when I say large, I'm talking about market sales -- market purchases. Numerically they are just a few but they are large in the sense of what they mean to the class. They are represented by highly competent in-house and outside counsel. Here the class members include both the OEMs and a significant -- the numerical side of it approximately 20 to 25 percent of all purchases by OEMs are through directed purchases by tier one and tier two entities. In other words, the OEM will tell company A we are going to need X number of thousands of these parts, you buy them, you perform your value-added service and then sell them to us. Those entities actually are the direct purchasers because they pay for it, and so those entities are a large part of this class, and they are an important part.

Of the OEMs many have chosen to obtain resolution of their claims independent of the class. Thus far the OEMs participate, even in these wire harness settlements, they participate in some and opt out of others. Certain OEMs, certain domestic OEMs are the primary purchasers from Yazaki, GM, and Chrysler, for example -- or Chrysler-Fiat, they opted out but they stayed in the other settlements, so it is an interesting way of looking at it. They are highly qualified, they make their own choices, and the fact that they opt out of some but stay in others indicate that they do have a

preference for class treatment when it best suits their needs, and that's their job to do whatever is best for the corporation at any given point in time.

I would -- speaking for a moment of that, Ford, for example, has not participated in any of the class settlements, they have filed their own wire harness case, so they are clearly taking their own path.

Now, I will say this, that we believe our efforts in this case did provide a material benefit to the OEMs. Certainly with the domestic OEMs we had regularly scheduled meetings to update them and to brief them on the status of the case. At the early stages of the case when both the -- I'm sorry, when both the end-payor plaintiffs and the defendants sought discovery we coordinated with the OEMs and provided them material assistance. So whether they participated in all these settlements or not, we are confident that we actually added to their knowledge and appreciation of where the case was at any given point in time.

With respect to objections, there were none in this case. And I think under the theory of class members vote with their feet, the vast majority of class members did remain in the class.

Finally, Your Honor, the direct-purchaser counsel believe that the request for final approval of these

settlements do meet the requirements of Rules 23(a) and 23(b) in terms of commonality, numerosity, typicality, and adequacy. We firmly believe that the settlements are fair, reasonable, and adequate. And we finally argue that class interests are best served by an order of final approval.

If you have any questions I'm pleased to answer them, Your Honor.

THE COURT: No, un-un. Does anybody have any comments to this?

(No response.)

MR. KANNER: We should also, Your Honor -- Your Honor should also inquire of the courtroom if there are any objectors present today.

THE COURT: Right. Are there any objectors?

(No response.)

THE COURT: They all look suspiciously like attorneys.

MR. KANNER: Far more dangerous than objectors.

THE COURT: All right. Thank you.

MR. KANNER: Thank you, Your Honor.

THE COURT: All right. We have the direct-purchaser plaintiffs' motion to final approval of the settlements with Chiyoda, Fujikura, Leoni, Sumitomo, and Yazaki, and in total -- the amounts were put on the record, I'm not going to repeat the amounts for each of the

individual defendants, the total being $249,151,000, and it relates to all of the direct purchase actions in the wire harness case against the settling defendants.

The background of this case is well known to the Court and it has been put on the record this morning, and the Court -- the Court also notes that the settlement here provides to the direct purchasers of the wire harness, there was notice, it provided preliminarily for notice and the notice was given as stated on the record, and a summary notice of the settlement was also published in the Wall Street Journal and the -- what was that, Automotive News?

MR. KANNER: Yes.

THE COURT: And there were no objections. Clearly there are no objectors here today. There are no objections received by counsel. And so the Court notes that there were, however, exclusions from the class and those counsel referenced and they are specifically noted in the papers.

Is the proposed settlement fair, reasonable, and adequate? And the Court says yes, this is -- from looking at everything that we have in this direct purchaser action it is a reasonable compromise. Nobody knows, of course, what it would be had it gone to trial, but it is a reasonable compromise in light of the liability, the damages, and the procedural uncertainties of the parties. In addition to the

cash payment, the settling defendants are required to give cooperation to the plaintiffs for the remain -- against the remaining defendants.

In exchange for the payment and cooperation the direct plaintiffs -- the direct-purchaser plaintiffs agree to release the settling defendants from the present antitrust claim. And I do want to note that there are provisions in each of these for some reduction in the settlement amount if certain criteria are not met. And the side agreements show that Fujikura retained the right to reduce the amount of settlements by -- as much as but not more than 95,000 and to withdrawal from the settlement in the event of valid and timely requests for exclusion by members of the Fujikura settlement class, and each of them had such a provision, I'm not going to put on the record each of these provisions.

As a result of the opt-out requests, the Yazaki settlement was reduced to $57,110,240.20, and the Fujikura amount was reduced from 9,500,000 to 9,405,000. Chiyoda, Leoni, and Sumitomo were not reduced due to opt-outs, and the amount of the total settlement of these five, combined with the previous settlements, total I believe counsel said $102,736,240.10.

The settling defendants' sales remain in the case as a potential basis for joint and several liability and damages against others current or future defendants in the

litigation. Let me say current, I'm not going to say future because --

MR. KANNER: I think you are safe with that, Your Honor.

THE COURT: Okay. Rule 23(e) requires court approval of the settlement, and under 23(e)(2) the settlement must be fair, reasonable, and adequate, and the Court considers a number of factors in determining whether it is fair, reasonable, and adequate like the likelihood of success on the merits, weight against the -- weight against the amount and form of the relief offered, the complexity, expense, and likely duration of further litigation, the opinions of class counsel and class representatives, the amount of discovery engaged in, the reaction of absent class members, the risk of fraud, collusion and lastly the public interest.

And review and approval of the class settlement involves a two-step process, preliminary approval, which we have done, of course, and the final approval. Clearly here there is a likely -- in weighing the likelihood of success on the merits against the relief offered the ultimate question is whether the interest of the class as a whole are better served if litigation is resolved by settlement rather than pursued, and even though direct-purchaser plaintiffs are optimistic or is -- are -- certainly appear to be optimistic,

success is not guaranteed.

Some defendants have vigorously defended the case, and DPPs acknowledge the risk that defendants may prevail with respect to certain legal or factual issues. The settlement class counsel believe the settlement is an excellent result.

The complexity, expense, and duration of continued litigation. I couldn't help but note that you said the first consolidated case was filed in May of 2012.

MR. KANNER: 2012.

THE COURT: That it has already been five years. It has flown by, hasn't it? So we know that it takes a long time, and if this were to go to trial, I would hesitate to even imagine when that would be. But the case is all -- this specific antitrust case, I want to say all antitrust cases, but specifically this one is particularly complex and so this iffyness is resolved with this settlement.

In deciding whether the proposed settlement warrants approval, the Court considers the judgment of counsel and the presence of good-faith bargaining. I know that all of these companies, these defendants, have competent and as I have seen excellent counsel in representing them, and clearly the plaintiffs have excellent counsel in representing them. So as I watch this, these negotiations occurred at arm's length, and the Court gives much credit to

counsel to come up with an amount, and I respect the amount that counsel has indicated for this settlement. There has been substantial recovery to give them guidance as to what the -- as to the facts here, and the information that they got through discovery allowed the evaluation of the strengths and weaknesses of the cases. And also here in looking at the reaction of class members, we know that there are a number of opt-outs which I think is to be expected but there are not objections to the settlement.

Okay. There's arm's length negotiations, I think I already covered that.

The public interest is certainly served by the settlement of complex litigation. It conserves judicial resources because these suits are so notoriously difficult and unpredictable.

And in terms of the notice the Court has also referenced the notice that was given in this case, and I think it was notice that was given in a reasonable manner. The rule does not require actual notice nor does it require individual mailed notice, though there was individual mailed notice in this particular settlement.

I believe specifically here it is 4,472 potential class members were directly mailed so the Court does approve the proposed distribution. I believe it is fair, reasonable, and adequate, and the notice was appropriate. The settlement

class is certified pursuant to Rule 23 for purposes of effectuating the proposed settlement.

There certainly is numerosity as we have already indicated that notices were mailed to over 7,400 direct purchasers. There's commonality; there's questions of law and facts common to the class, and that is whether the defendants engaged in a combination and conspiracy amongst themselves to fix, raise, and maintain or stabilize the price of wire harnesses. There's typicality; the claims of the representatives are typical of all of the claims of the class. The injuries here arise from the same wrong that is alleged against -- or alleged as to injuring the class as a whole. And the representative parties, and I do say that the Court has appointed interim counsel and I do appoint them as the counsel for the class.

The Court notes under Rule 23(b)(3) that that is satisfied here. That class plaintiffs demonstrate that common questions predominate over questions affecting only individual members, and that the class resolution is superior to other methods.

Therefore the Court finds that it approves the settlement and distribution and certifies the settlement class for purposes of the class settlement. Okay.

I believe there is also in this case, I think I mentioned this in the beginning, where you want a judgment

against these defendants --

MR. KANNER: No, it is actually a judgment release, it is an order releasing --

THE COURT: Releasing the defendants.

MR. KANNER: And I have extra copies if Your Honor needs them.

THE COURT: Okay. You could give those to the clerk to enter later, but the Court will sign those releases. Anything else? Any defendant want to say anything on this?

(No response.)

THE COURT: Okay. Mr. Hansel?

MR. HANSEL: May it please the Court, good morning, Your Honor. Greg Hansel for the direct-purchaser plaintiffs.

Direct-purchaser plaintiffs' counsel have filed their motion for an award of attorney fees, reimbursement of litigation expenses, future payments of litigation expenses, and incentive awards. And I'm here to make a brief presentation without repeating everything that is in our brief and the attachments.

THE COURT: Okay. I don't want to throw you off, but can we go to the incentive awards for a minute?

MR. HANSEL: Absolutely.

THE COURT: They are $50,000, right, to each?

MR. HANSEL: That's what we are requesting, Your Honor, yes. And if I may explain --

THE COURT: Go ahead.

MR. HANSEL: -- the basis of that?

THE COURT: Yes.

MR. HANSEL: Incentive awards or service awards, as they are often called, are within the discretion of the Court. We noted that the Court granted incentive awards of $50,000 each to the auto-dealer plaintiffs, and we --

THE COURT: You know, I knew much more about the auto-dealer plaintiffs and know a lot about what end-payor plaintiffs are too now, and we did hear from Mr. Kanner, that's true, about some of the things, the depositions that the direct plaintiffs have given, but what else?

MR. HANSEL: Let me tell the Court some of the things that the direct-purchaser class representatives have done. So beginning in 2011 with the first filed direct-purchaser action of Martinez Manufacturing, and there are now seven proposed class representatives of the direct-purchaser class, and each one of them has done several onerous tasks over the last five to six years since they joined the case as named plaintiffs and proposed class representatives and put themselves out there to stand up for the class and try to create a recovery for themselves and the whole class. So they have worked with counsel to investigate the case.

I don't believe any of the direct-purchaser

counsels profess to be car guys or car gals in terms of having a deep knowledge of the automotive industry or auto parts in particular, so our clients have provided an invaluable service by educating us as their attorneys about how the industry works. And as the Court is well aware, being here in Detroit, it is a unique, large, and complex industry, there is a lot of history, and we learned a lot about it from them even before we filed the first complaint.

Once the complaints were filed and then they were asked and did step up to provide disclosures -- Rule 26 disclosures, to respond to interrogatories and requests for production producing for our review, for counsels' review, over a million pages of documents as well as transactional data which we reviewed and where appropriate produced to the defendants in response to their requests for production. They worked with us on interrogatory answers, and we interviewed them at length. We asked them about their computer systems, we asked them to retain documents that they might otherwise have discarded. For example, Craft-co, down in Jackson, Mississippi, has 104 boxes of documents that they have been keeping for six years in a storage unit, and we have scanned all of those and they have explained the documents to us, and where responsive we have produced them to the defendants.

Then it was time for depositions, and that was a

very large undertaking for them. Some of them sat for multi-day depositions. I think Mr. Kanner said approximately 11 depositions of named plaintiffs were taken. There were often multiple days of prep in person and on the phone working with exhibits, and then finally sitting for depositions for two or three days of the defendants in the defendants' very thorough fashion of taking depositions. They reviewed the deposition transcripts for errata. They have also monitored and been kept apprised of the litigation throughout. We have kept them up to speed giving them status reports periodically. And whenever there was a proposed settlement we went to each of the seven and asked them -- made a recommendation to them about why we felt each settlement was fair, reasonable, and adequate for the class. They were never promised or guaranteed any incentive awards.

In this case also the incentive awards are small compared to the recoveries of the class as a whole. I guess one good example is in the OSS case, 28 million in checks cashed, and in that case we have not requested incentive awards yet, but in the wire harness -- in these wire harness settlements with 102.7 million of settlements before the Court today on our motion for fees, costs, and incentive awards there will be very substantial payouts, so it is not a case where you have an incentive award that's been requested that would dwarf the payments being made to class members.

So class representatives didn't have to do this, they were willing to do it. They were interested in helping to create a recovery for the class, including themselves, in their pro rata participation based on their purchasers in the recovery. They come from different walks of life, different types of businesses. They are -- generally speaking in the wire harness case they are tier purchasers who bought wire harness products, including whole wire harnesses, and other types of products within the definition of wire harness products in the complaint to usually incorporate into some kind of a module or a system and then sell it into the manufacturing supply chain to make new motor vehicles, new automobiles.

So some of them were directed purchasers directed by automotive OEMs to purchase wire harness products from certain defendants at a price negotiated through an RFQ process by the OEMs, others bought the parts without being directed but they bought the parts from defendants directly and then incorporated them into systems and sold them eventually to auto manufacturers.

So the -- and they will stay the course as well. One never knows the future but to my knowledge none of them have backed out or gotten cold feet about doing this work, and they are with us for the long haul as far as I know.

And, you know, we are now continuing this

litigation against Denso and Furukawa, and we are going full bore as always. And we have advised our clients to be prepared to testify at trial and to prepare for trial in advance of that if needed. They understand that there will be a motion for class certification in which -- which will be contested and in which we will be asking the Court to appoint them as representatives of a litigation class as distinguished from a settlement class.

So frankly we are pleased with their service to the class and we think they are deserving of $50,000 each for serving as class representatives and achieving this result of $102 million settlement.

THE COURT: How did you arrive at the $50,000?

MR. HANSEL: We looked at other cases in this area of law, I believe we cite some cases in our brief that establish a precedent for different amounts, some of them are similar to this $50,000 amount, I don't have the chapter and verse, they are in our brief, and we did take note as I mentioned at the outset of the Court's award with respect to the auto dealers who likewise have provided a lot of discovery and, you know, been the subject of discovery issues throughout the case. So we think that the service they performed is deserving.

THE COURT: Okay.

MR. HANSEL: I would also like to note, Your Honor,

that yesterday we submitted via ECF utility a revised proposed order on this motion, and I also have copies. I believe that Nat Fink delivered copies to the clerk this morning, hard copies, but I also have -- here we go. I also have extras.

So that is -- our original proposed order on attorney fees and costs and incentive awards was sort of a bare bone's order. This one tracks previous orders entered by the Court including some of the specific language and case cites that Your Honor has referenced in the -- in awarding fees in the occupant safety systems case to direct purchasers, and just in July in awarding fees to the end-payor counsel. We tracked a lot of that same language because we thought that was a precedent the Court had set and the Court was comfortable with that type of language.

Of course, we do not presume -- this is only a proposed order, we do not presume to ask the Court to enter it as is, and the ECF utility is a submission of the document in Word format so, of course, it is convenient for the Court to make whatever changes the Court sees fit, but we hope it is convenient and will assist the Court in reaching a conclusion on the fee issue based on the Court's previous rulings.

So with that, I will just jump right into -- probably the greatest factor in an award of attorney fees is

what is the result, and direct-purchaser plaintiffs' counsel submit we have achieved a great result in this case with settlements of 102.7 million after the opt-out reductions, so that is the final number for these eight settlements. There were just 11 groups of opt outs out of the 74 -- 172 class members to whom notice was mailed. There were no objections to the settlements or to the fees. So in short we believe we have achieved a great result plus we have also got the cooperation of the settling defendants against the non-settling defendants who remain.

This result was hard won. The Court has alluded to the complexity not just of antitrust class actions in general but of this one in particular. And we start -- we start each case with the philosophy that the case will be tried. This is full-bore litigation. We don't pull any punches and neither do the defendants as the Court is well aware. Motion practice has been and continues to be hard fought in this case. The case is ongoing.

Discovery was extraordinarily complex with over 10 million documents produced by the defendants, many in Japanese, and over 50 depositions of the defendants mostly in Japanese language, as well as the plaintiffs' depositions. It is a global conspiracy that we are litigating about, so we have to get a handle on all aspects of it around the world.

We have great respect for our opposing counsel, big

law counsel, and we've been litigating against some of the largest auto parts manufacturers in the world, each of them putting up a vigorous defense.

We have worked extensively with experts and that has been a major component of our efforts, and the experts -- and we are ready to get back on that horse with the experts for the motion for class certification when that comes. Analyzing antitrust impact and damages are complex economic and legal issues, and we have done that work.

There is another aspect of the wire harness case that explains why it was -- has been -- this settlement has been so hard won and has come at such a large cost of time and expenses but time in particular. This is the first -- as the Court knows, this is the first case in the MDL, the wire harness case, and I would compare it to a first child in a family. The first child, for better or for worse, gets the brunt of the parenting and kind of becomes an example for what -- for the kids who come next. The wire harness case has created templates for all of the other auto parts that have followed beginning with things like case-management orders, deposition protocols, initial discovery plans, supplemental discovery plans, protective orders all heavily negotiated, but now that they are in place in the wire harness case it's much easier to reach agreement in the other parts, but all of that time was necessarily and appropriately

incurred by plaintiffs' counsel and defense counsel in the wire harness case just because it was the first case.

The same is true of motion practice. As the Court has noted, since the Court has ruled on so many legal issues on motions to dismiss in the wire harness case the Court can address those same issues in a more streamlined fashion in the next series of auto parts. But, again, think of the amount of time the Court spent on the wire harness, perhaps vastly disproportionate to the other auto parts that come later and for good reason. It sets a precedent for these other auto parts, and we hope that it would permit the rest of the parts to go faster.

Also wire harness is by volume of commerce, amount of criminal fines and amount of settlements are one of the largest auto parts, so for that reason it justified an outsize effort compared to some of the other auto parts, and plaintiffs' counsel ran the full gauntlet of issues in the wire harness case.

We are requesting a 30 percent fee of the settlement amount. About a year ago, at the Court's request, all of the class plaintiffs submitted briefs -- what I would call generic briefs on attorney fees to the Court in an effort to, I believe, for the Court to become educated and to achieve consistency across these parts, to have guidance on how to rule on fees in these auto parts cases. A year later

I think it is fair to say that Your Honor is probably one of the more experienced judges in dealing with fee issues in antitrust class actions. So at the Court's request, direct purchasers submitted a brief in June 2016 which we then argued or presented at a status conference, along with the other plaintiffs. And I just want to say that the approach that we have taken in this motion is the same approach we said we would take in that brief. We suggested a standard baseline percentage of 30 percent but that the Court retain flexibility to take into account the unique circumstances of each recovery, whether it be by settlement or trial in tailoring an award of attorney fees to each part and each recovery.

The example we gave then holds true now; that wire harness presents a different case than the occupant safety system settlements that the Court addressed with us before. In that case --

THE COURT: You received a 25 percent award of --

MR. HANSEL: That's correct, Your Honor, which was about a 2.1 multiplier I believe it was, and in this case if the Court grants our request for a 30 percent attorney fee, it would be a 38 percent multiplier of our lodestar, in other words, it would be a negative multiple. It would be less than 40 percent of the value of our time in the case, so that's a big difference.

The percent of the fund method, which we recommend, and which the Court has followed to date in the auto parts cases, is the appropriate method in this case. It conserves judicial resources, it aligns the interest of counsel with the interest of the class, its typical in this type of litigation, and we cite a large number of cases to support that in our brief.

In fact, the Court has in the -- in this MDL awarded higher percentages in some instances. In an auto dealer's fee order and a truck and equipment dealer fee order the Court awarded a third. The Court awarded the direct purchasers 25 percent in the occupant safety system case. So the Court has been above and below the 30 percent figure in different matters for valid reasons.

Nothing in this case warrants a lower percentage than 30 percent. It is a great result in a complex and challenging case. It is a large recovery, but not a recovery or multiplier so large as to support a lower percentage or to create a windfall for counsel. If the Court considers the so-called mega fund precedent, 102 million is considered sort of the low end of mega fund. Even in cases with recoveries well over 100 million, many courts have awarded 30 percent as an attorney fee as we cite in our brief.

So the lodestar crosscheck reveals there is no windfall here. The value of time submitted in Exhibit 6 to

our motion is $81,407,770 which works out to 38 percent of the requested 30 percent fee.

Counsel deserve to be awarded for taking on a risky case. We have been at this for several years and made a huge investment in time and money. The way contingent fee litigation works the winning cases are suppose to pay for the losers.

We also request that the Court, as the Court did in OSS, apply the 30 percent percentage before deducting costs because we have recovered the costs for the class and that's a benefit. First, counsel advanced the costs and then recovered them for the class creating a benefit for the class.

The Sixth Circuit factors also support the fee, and I've covered most of those already but just to tick through them, the benefit to the class, the lodestar crosscheck, the risk of non-recovery, which the Court commented on earlier, the stake that society has in awarding attorneys who win valuable benefits for a class and vindicate important public policies. In this case, the Department of Justice expressly did not seek restitution for the victims but we did. The complexity of the litigation and the skill and experience of counsel on both sides.

We also ask the Court to reiterate that lead counsel are authorized to allocate the fee among the team of

32 law firms who have contributed to this recovery.

With respect to costs, we request reimbursement of costs that class counsel have paid in the amount of 2.1 million, and those do not include any costs that were paid from previous settlements.

We also ask the Court to award ten percent of the settlement amount with a cap of 7.5 million for future payment of litigation expenses, and I would like to explain that in a little more detail. There are really two components to the future payment of litigation expenses that we are requesting, the 7.5 million.

First, I want to note that the ten percent amount with the cap is consistent with what the Court has done in other cases in this MDL; allocated some portion of recoveries to be used to litigate against non-settling defendants because of the substantial costs involved, so the 7.5 million we are requesting, and we may not use all of it, we may not need to, we will not incur it if it is not necessary and appropriate. It consists of two components, one is expenses that we have incurred and we either have been billed or expect to be billed soon by our vendors, in particular we have economic experts, econometricians, we have discovery vendors such as court reporting firms, videographers, interpreters, and then we also have a substantial expense for document management which includes storage, analytics, and

licenses for attorney review and coding of documents in different languages.

So we have --

THE COURT: What's the total amount again on that expenses?

MR. HANSEL: The future payment of litigation expense is 7.5 million out of the 102.

THE COURT: Okay.

MR. HANSEL: And so the incurred but unpaid expenses are about 1.7 million, which would leave an additional 5.8 to use for expenses incurred in the future.

We've already discussed the incentive awards so I won't repeat that. As the Court knows, we've submitted the proposed order.

So in conclusion, Your Honor, direct-purchaser counsel submit that the 30 percent request is fair and reasonable to the class, fair and reasonable to class counsel. The proposed order touches on the key elements that I have addressed. And this order is now before the Court -- this proposed order is now before the Court together with the other orders that have been submitted on the final approval. We have great respect for the Court's deliberative process and appreciation for all the work the Court has done in managing this case and making rulings. We hope the Court can expedite this ruling.

My managing partner comes by my office on a regular basis and says Greg, that $102 million settlement is great but when are we going to get paid? And the joke in the office is he asks me for an update every 20 minutes. But anyway, we do appreciate the Court's attention to this. If there are any more questions I'm happy to address them.

THE COURT: No.

MR. HANSEL: Thank you, Your Honor.

MR. KANNER: Your Honor, if I might?

THE COURT: Yes.

MR. KANNER: Steve Kanner again.

With respect to the incentive awards or the service awards, as you were asking Mr. Hansel those questions I remember some of the answers that our clients gave under deposition to the question how much time did you spend preparing for this deposition, we are not talking about their time in the case, but just for the 30(b)(6), 30(b)(1) deposition, and one of the clients matter of factually looked at defense counsel and said well over 100 hours. And I think that gives Your Honor a concept or an idea of just how seriously the class representatives of this case took their role in representing the class. And I, for one, as a lawyer was thrilled to see in this case just how seriously our class representatives took their responsibilities. I just want to leave that note with Your Honor.

THE COURT: Thank you.

MR. KANNER: Thank you.

THE COURT: All right. The Court has reviewed this motion for an award of attorney fees, litigation cost and expenses and incentive awards to the class reps. We know right now that we have a settlement amount after the opt-out provisions of $102.7 million. The Court certainly believes it should award reimbursement for the costs and expenses, that goes without saying. The only dispute that I have is the fact that I think it should come off the total award before we determine attorney fees. I have done this in every case, I think it's both a sharing in the costs with the persons who will recover the money, and it also leads to being as conservative I think as one can in expending costs. And given the size of this recovery I think it is a reasonable way to deal with the costs for the reasons that I've set forth and given that there is enough money to do this up front.

So the Court will award the costs. The Court will also set aside -- I believe it was ten percent you asked for, ten percent of the settlement fund for ongoing expenses.

MR. HANSEL: It was capped at 7.5.

THE COURT: Yeah, $7.5 million.

In terms of the incentive payments to the class reps, I asked questions about that because I think we needed

a little bit more information on the record to confirm this. I think we have used $50,000 before. I think that it is reasonable to use the 50,000 now. The Court is aware that the wire harness case, of course, was and is the first case that was filed here, and I believe that there was -- that it is a case that is a predicate for all of the other cases that we have, and I think the work at the beginning was quite extensive just to establish -- I want to say a simple protocol but I don't mean simple protocol, it is not simple, but to establish the protocol that we are going to use for this case.

And looking at what it is said that the -- that the individual, I believe, seven class representatives of the direct purchasers did, they were charged with the task of answering the interrogatories or assisting in the answering of the interrogatories, to provide the -- in order to provide the Rule 26 disclosures, and they -- it was said here today they prepared or produced over a million pages of documents, they had their depositions taken which were extensive, plus the amount of time that was just mentioned that individual plaintiffs said they had spent in preparation, they reviewed all of the depositions, they agreed to testify at trial, and I think that they were -- they were the standard for plaintiffs because they were the first and what they did had to be looked at by every other plaintiff in this litigation,

so the Court will award the $50,000 to the class representatives.

The attorney fees I believe is the next item, and the Court has struggled, as you know, with these attorneys fees to try to be fair. I at one time I would like to say let's just give the percentage and another time I say oh, no, that needs to be modified. And the Court -- the appellate courts instruct us that we have to look at a number of factors in determining these fees. We know now that there is either the percentage of the fund approach or the lodestar approach. This Court has taken the approach in the other cases of a percentage of the fund with a crosscheck by the lodestar, and the Court notes that it has the discretion in determining how to determine these attorney fees.

Counsel has given the Court in the past general briefs just on attorney fees, and I note a number of factors here that were considered, and I also note the various cases that have been cited by the plaintiffs in these briefs, and these attorney fees percentages go all over the place for various reasons. We know, of course -- I guess we always look at a third and that was established way back when in personal injury cases, and I think that's kind of where -- it has to be where this was picked up and then it went down a little bit as the cases such as this had such high recovery rates that the courts search all the time for what is a fair

and reasonable attorney fee and not a -- what is it called -- a windfall to the attorneys. Of course, any windfall to the attorneys would be at the expense of the litigants because that is that much less that they have to share in. But there are six factors that have to be considered, and that is the value of the benefit rendered to the parties, the society's stake in awarding attorney fees, and that's in order to maintain some incentive to continue these cases, that if you see a wrong, you know, you can -- you can actually address it because you will be compensated if you are successful.

The services were undertaken of course on a contingency fee basis, and I want to say in this case I think undertaking the services on a contingency fee basis is probably the only way this could have gone as a practical matter, but it also creates a great risk for the attorneys involved because of the expenses that they have to put out and may never recover, and when we are talking about million of dollars of expenses, not including attorney time, we are talking about a significant sum of money, so there is a great risk here.

The Court also looks at the professional skill and standing of counsel, and I've said this before and I continue to say, I think we have extremely competent attorneys who have proven their abilities to handle these types of cases, who have engaged in settlements in such a reasonable and fair

arm's length manner, their skill and reputation in the community is well known, so there is a significant value to their services, and so here I think all of the criteria have been met.

I understand that the attorneys have filed -- I've got this written down here, have filed that they spent in combined hours on this case 179,636.2 combined hours. Who did the 0.2?

MR. FINK: Your Honor (indicating) --

THE COURT: Yeah, okay. When multiplied by the appropriate hourly rates it is 81,407 -- 81,407,770. The Court has reviewed, I wish to state, the hourly rates for the various individuals. The hourly rates which I as a civil servant has always struggled with recognize what the hourly rates are in the legal community today for this type of litigation, and in recognizing this I recognize the value of the plaintiffs' attorneys work at this $81 million figure.

The amount requested, however, now, of course, we are discussing the crosscheck yields a negative multiplier of 0.95, so --

MR. HANSEL: Your Honor, if I may just --

THE COURT: Yes.

MR. HANSEL: -- make a short statement on that?

That would have been the multiplier if there had been no opt outs and the settlements had been in the

$257 million range of the original settlement amounts before the opt-out reductions, and the multiplier now that the opt-out reductions have taken the value of the total settlements to 102.7 million --

THE COURT: Uh-huh.

MR. HANSEL: -- is 0.38.

THE COURT: Yes, I've got that, 0.38, so you are saying that you are getting less than 40 percent of the value?

MR. HANSEL: Correct, Your Honor, requesting less than the 40 percent.

THE COURT: Yeah, I have here assuming no opt outs but for the opt outs, but I wanted to look at it as a whole to see how it crosschecks, and I think it is notable that the crosscheck is in that range.

To me to look at the hours using the hourly rate is a task that is tremendous plus I don't think it can be well scrutinized. There is so much work here, who's to say you spent an hour and you should have only spent ten minutes on a document? I mean, obviously big things -- glaring things come out, but I think with the hourly rate it is just too hard to control, and obviously you are selected for your expertise and your standing in the community, along with that comes your honesty and your integrity in doing these hours. So I assume without detailed investigation or hiring others,

as I am aware in some cases is done, hiring accountants, et cetera, to review hourly work, the Court is accepting what you are saying but I still have the understanding that it is hard to define an hour so to speak.

Interestingly enough I have a new clerk who -- I had a clerk who is new to the legal profession and is doing hourly rates, and it is like can I get up for a cup of coffee? I don't think so. I mean, it seems a little extreme. So I see this as showing that the hourly rate is not a perfect way but it does give us as crosscheck.

So the Court in determining the percentage at -- you are asking for 30 percent as you know I have in the last case you had gave you 25 percent, and the others I have given some 30 or a third, and I have limited the rest to 20 percent pending the outcome of this litigation so I can see where are we going when we have the whole thing done, but I think that this wire harness case is deserving of the 30 percent attorney fee. As I said before, I think it is the predicate, it established the procedures and protocol for the rest of the parts, and I think it is a fee that is well earned in this massive litigation. So the Court will award the 30 percent of the attorney fee, but it is to be taken after the distribution for costs and expenses.

All right. Did I forget anything, Mr. Hansel?

MR. HANSEL: One clarification?

THE COURT: Yes.

MR. HANSEL: Your Honor, I believe the Court has also given counsel an incentive to be as efficient as possible with the use of that 7.5 million, so I think what we would do, given the Court's ruling, would be, first, we would deduct the 2.1 million of reimbursed costs, we don't apply the 30 percent fee to that.

THE COURT: Right.

MR. HANSEL: Then we would deduct the 7.5 million for future payments of litigation costs and not apply the 30 percent to that.

THE COURT: At this time.

MR. HANSEL: At this time, but if we don't use it all we would apply the 30 percent to the remainder?

THE COURT: Correct.

MR. HANSEL: Thank you, Your Honor.

THE COURT: Thank you. Thank you for clarifying that. Anything else?

(No response.)

THE COURT: All right. Would you present an order consistent with this ruling?

MR. HANSEL: We have, Your Honor, and that's the one that I believe the clerk handed you up at the beginning which we submitted yesterday via ECF utility.

THE COURT: Okay.

MR. HANSEL: I do have extra copies but it is the same thing, if you would like, Your Honor?

THE COURT: And you have taken the costs off?

MR. HANSEL: I guess I need to modify that. I'm sorry, I apologize.

THE COURT: Okay.

MR. HANSEL: I do need to modify that. We will submit that today, Your Honor.

THE COURT: Very good.

MR. HANSEL: Thank you.

THE COURT: You can take that to your partner and tell him there's money coming.

MR. HANSEL: We will do, Your Honor. Thank you.

THE COURT: All right. Now we have the motion -- excuse me, there was one other thing. There was the allocation to fees to others, and I did not mention that. I believe counsel has the right, pursuant to the Court's order, to allocate the fees, and I maintain that. I, of course, always have the right to review if there is an objection but I think you should allocate the fees at this point.

MR. HANSEL: Thank you, Your Honor.

MR. KANNER: Thank you, Your Honor.

THE COURT: All right. This is the anti-vibrational rubber part defendants' collective motion to dismiss the direct purchasers' complaint. Appearances,

please.

MR. REISS: Yes, Your Honor. Steve Reiss, of Weil, for the Bridgestone defendants.

MR. FITZMAURICE: David Fitzmaurice, on behalf of Weil, also for the Bridgestone defendants.

MR. GIARDINA: David Giardina, from Sidley Austin, for the Toyo defendants.

MR. RUBIN: Michael Rubin, of Arnold & Porter, for the Yamasa defendants.

MR. ROZGA: Kyle Rozga, from Weil, for the Bridgestone defendants.

THE COURT: Okay.

MR. FINK: David Fink will be arguing for the plaintiffs.

THE COURT: All right.

MR. REISS: Your Honor, I think we are trying to hook up to a PowerPoint so it may take us five minutes.

THE COURT: We will take a five-minute break.

THE LAW CLERK: All rise. Court is in recess.

(Court recessed at 11:26 a.m.)

– – –

(Court reconvened at 11:35 a.m.; Court, Counsel and all parties present.)

THE LAW CLERK: All rise. Court is in session. You may be seated.

THE COURT: All right. Mr. Reiss.

MR. REISS: Thank you, Your Honor. We've given the plaintiffs a hard copy of the PowerPoint. If Your Honor wants one?

THE COURT: Yes, please.

MR. REISS: Your Honor, this is a motion to -- the AVRP defendants' motion to dismiss the direct purchasers' complaint. It is a bit unusual because, in fact, the direct purchasers' complaint isn't really a direct purchasers' complaint. In fact, it is probably not even a legitimate indirect purchasers' complaint as we will explain.

And I think just briefly, Your Honor, to give you a little bit of history here, Your Honor is definitely very well acquainted with the fact that the AVRP case is one of the three leading cases along with wire harness, bearings and the bearings cases. The AVRP case is with respect to the indirect cases, both the ADPs and EPPs, are largely at this point not finally but they are -- they is substantial progress on the settlement front, that's what I will tell you. Nothing has come before this Court but because of their position in these cases there has been a lot of progress, and if you see, Your Honor, the EPP complaint was filed on June 13th, 2014, the ADP complaint was filed shortly thereafter on June 21st, 2014. Discovery in the indirect purchaser complaints is complete, over, done.

The -- I will say supposed, because it is a supposed, the direct purchasers' complaint in this case was filed on November 15th, 2016. Why is that significant? It is significant because the statute of limitations would have run on November 16th, 2016 because the latest date that the plaintiffs' acknowledge that they were on notice was November 16th, 2012. So by their own admission the last possible date they could have filed the direct purchaser complaint was November 16th, 2016, and they filed on November 15th, 2016. And, Your Honor, that explains a lot about the nature of this supposed -- supposed direct purchaser case.

This complaint is not like any other -- remotely like any other direct purchaser case in the auto parts case, not like one other direct purchaser case. First, all of the other direct purchaser complaints the plaintiffs are corporate entities, they actually bought more than one AVRP part. Here the plaintiffs are simply individuals.

Second, in every other direct purchaser case the plaintiffs allege, they at least allege that the parts were made by the defendants. Plaintiffs do not even allege that the parts were made --

THE COURT: Would you pull that microphone away?

MR. REISS: I'm sorry, Your Honor.

The plaintiffs do not even allege that the parts

they bought were made by the defendants in this case.

Third, plaintiffs -- in all the other DPP complaints the plaintiffs allege that they purchased parts directly from defendants, you would expect that, it is a direct purchaser case. In this case the plaintiffs concede that they did not purchase the AVRPs directly from defendants.

The fourth major difference, in every other direct purchaser complaint the plaintiffs identify the entity, they at least identify who sold them the part or the car. Plaintiffs do not identify the entity that sold them the AVRPs in this case.

And finally, the fifth major difference from every other direct purchaser complaint, the proposed class definition in every other direct purchaser case includes only purchases directly from defendants, that's what you would expect in a direct purchaser case. Here the proposed class definition includes purchases from, quote, entities of which defendants are the ultimate parent. You've never seen that in any other direct purchaser case.

Now, when I say this case is clearly not a direct purchaser case it looks mostly like the other indirect purchaser cases and, for example, the complaint in this case has overlapping allegations with the indirect purchaser complaints in this case about such things as the nature of

the AVRP conspiracy, the AVRP manufacturing process, the OEM purchasing process, and the nature of replacement parts. And we have just -- just to show Your Honor how similar this complaint is to the indirect purchaser complaints, from the ADP -- and this is from the auto dealers' complaint in this case, the auto dealers allege concerning replacement parts when repairing a damaged vehicle or where the vehicle's AVRPs are defective, plaintiffs and other auto dealers indirectly purchase replacement AVRPs from defendants. By the way, replacement AVRPs are what is involved in this case, that's what this -- that's what these plaintiffs supposedly, supposedly bought.

In the EPP complaint, the EPPs allege AVRPs are also installed in motor vehicles to replace worn out, defective or damaged AVRPs. The exact same allegation, the exact same allegation in the supposed direct purchaser complaint in this case.

Now, we've raised not just 12(b)(6) -- not just a 12(b)(6) challenge, we've raised a 12(b)(1) challenge to this Court's jurisdiction because of the unique deficiencies in this complaint, and 12(b)(1) is a very different ball game, Your Honor, than 12(b)(6). I know the Court is familiar with that.

Flowing from the Supreme Court's decision in the Lujan case, which has been repeatedly cited in the

Sixth Circuit, the Phillips vs. DeJuan case is just one of them, in order to show standing, as Lujan says, the irreducible Constitutional minimum of standing contains three elements, and it is the plaintiffs' burden to show these, to show these. First, an injury in fact meaning an invasion of a legally protected interest that is, A, concrete and particularized, and B, actual or imminent, and here is the critical part, not conjectural or hypothetical, and we are going to see why that criteria isn't met here.

Second, a causal connection between the injury and conduct complaint of, i.e., the injury complained of must be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the Court, and we are going to show why that's a problem here as well.

Now, we believe based purely on the face of the complaint the plaintiffs have failed to demonstrate that they have Constitutional standing. The only standing allegation in the complaint is quoted here: Plaintiffs purchased anti-vibration rubber parts directly from an entity of which one of the defendants is the ultimate parent during the class period. That's their allegation.

There is no allegation that the defendants made those AVRPs. There is no allegation that the defendants sold AVRPs to individual consumers. There is no allegation about

how the plaintiffs purchased the AVRPs. There is no allegation that plaintiffs -- and there is somewhat remarkable -- they don't even allege that they purchased the AVRPs from a Firestone store, which is the only conceivable basis that they could bring this -- well, they have no conceivable basis on which these plaintiffs can bring a complaint but it is the only conceivable place they could possibly have gotten.

THE COURT: Because none of the other defendants sell to individuals?

MR. REISS: Absolutely not, none of the other three defendants have retail outlets in the United States at all. So the Firestone stores are the only possible source of this purchase, and they don't even allege they bought them from the Firestone stores. Okay. That kind of speculative standing is totally unprecedented in these auto parts cases.

And -- and this is important, Your Honor -- based on the uncontroverted factual record before the Court, and the Court has before it five declarations, three from the other three defendants and two from Bridgestone, plaintiffs have failed to demonstrate that they have Constitutional standing, and here's how this analysis has to go. Under Sixth Circuit law, and this is where there is a factual attack on the subject matter jurisdiction alleged in the complaint, no presumption -- no presumptive truthfulness

applies to the allegations. It is not like a 12(b)(6). When a factual attack raises -- when a factual attack raises a factual controversy, the district court must weigh the conflicting evidence to arrive at the factual predicate that subject matter does or does not exist. That's the Sixth Circuit Getek case which they cite.

As I noted, we submitted five unrebutted factual declarations showing that the defendants -- none of the defendants sell AVRPs to individual consumers. Plaintiffs have not submitted any evidence to rebut those declarations, and they did not even move for jurisdictional discovery, so that's it. That's the record on jurisdiction. We are done. The game has been played and it is over and that is the record the Court must rule on. The existing factual record is uncontroverted and dispositive. There is no federal jurisdiction here.

Now, what is that uncontroverted factual record in a little bit more detail? First, none of the defendants sell AVRPs to retail customers. Defendants only sell AVRPs only to the OEMs and their suppliers; tier ones, maybe tier twos. Bridgestone defendants and Bridgestone defendants are the ultimate owners of most Firestone repair stores. There's actually a period in which some of those stores were franchises, are the only defendants with a retail operation in the United States, none of the other three defendants have

retail operations in the United States. Bridgestone defendants do not sell AVRPs to Firestone repair stores, they do not do that.

The other defendants obviously did not sell AVRPs to the Firestone repair stores. Once Bridgestone defendants sell their AVRPs to OEMs and their suppliers, they have no knowledge or control over any subsequent sales by the OEMs or suppliers to those AVRPs, none. Whatever those OEMs do or the tier ones with those AVRPs, Bridgestone has nothing to do with it.

Sixth, the Firestone repair stores purchase their AVRPs from auto dealers and distributors, auto dealers and distributors, not any Bridgestone entity, and those auto dealers and distributors are entirely unrelated to the Bridgestone defendants or any other defendant. Firestone repair shops do not purchase their AVRPs from any defendant.

And finally, the Firestone repair stores actually sell AVRPs made by many different manufacturers including a number of manufacturers that are not defendants in this case.

All right. So that is why, just in summary, plaintiffs can't establish Constitutional standing. There's none, and the factual record is closed on that, and that's the end of the case.

But there is even more -- there is more, I don't think the Court has to go beyond that, but there is still

more because we figured we would get it all out at once. It is absolutely clear that if anything, and I say if anything, these plaintiffs are at most -- at most indirect purchasers so they clearly lack antitrust standing separate from Constitutional standing, right? You've got Constitutional standing, they've lacked that, and now they separately lack antitrust standing under Illinois Brick. As I know the Court is very familiar, under Illinois Brick only direct purchasers can bring a damage case under the Sherman Act, right? Indirect purchasers can't, that's why all of the indirect purchaser cases before Your Honor, the ADDs, the EPPs, are all brought under state law because they can't seek damages under the Sherman Act.

The complaint alleges that plaintiffs purchased AVRPs from an entity other than the defendants, their indirect purchasers, and here is what they allege; plaintiffs purchased anti-vibration rubber parts directly from an entity of which one of the defendants is the ultimate parent during the class period. That's not a direct purchase, that's an indirect purchase. They concede that their indirect purchasers so they are clearly out barred by Illinois Brick unless an exception applies, and the exception that they rely on is a very narrow exception that has never been found to apply by the Sixth Circuit, never, and it is the ownership or control exception, and it is set forth in the Sixth Circuit's

decision in the Jewish Hospital case, and that exception only applies when a direct purchaser is owned or controlled by the defendant such that their, quote, has effectively been only one sale.

So if a manufacturer is selling for -- to its wholly-owned distributor and that wholly-owned distributor makes a sale, the sale from the manufacturer to the wholly-owned distributor is not considered -- that that is considered one entity and the sale by the wholly-owned distributor then becomes the first sale. That's the only time that exception applies, it doesn't apply here, and it has never been applied by the Sixth Circuit.

The plaintiffs allege no facts, none, supporting the ownership control exception, so even if they wanted to take advantage of it they made no allegations capable of taking advantage of that exception which frankly they couldn't in any event. And the factual record dispositively proves that the ownership control exception does not apply because there are multiple, not just one or two, there are multiple intervening sales to independent entities unrelated to Bridgestone. Okay. So the notion that there is a sale between completely controlled and owned entities and that doesn't count doesn't apply here because as we will see in a minute there are multiple sales to entities wholly unrelated to Bridgestone before you ever get to the Firestone stores.

On the left-hand side, Your Honor, is what the plaintiffs speculate is the sales chain; Bridgestone Corp. to Bridgestone Americas to Bridgestone retail operations, that's the Firestone stores, to retail consumers. Unfortunately that's completely factually incorrect as we have established with undisputed, unrefuted affidavits. The actual -- the actual facts are the following: Bridgestone defendants or any other defendant sells through arms length transactions to OEMs and their tier one suppliers. By the way, that sale that ends the only exception to Illinois Brick, there is a sale to an independent entity.

It gets worse though because the OEMs and their tier one suppliers, again through arm's length transactions to unrelated customers, sell the parts to the auto dealers and auto parts distributors. So now you have at least two sales to entities wholly unrelated to Bridgestone or any other defendant, and those auto dealers or parts distributors, and there may be other layers in between there, they are the ones who sell to the Bridgestone stores. So the Bridgestone stores are buying these parts from entities that have nothing, nothing to do with Bridgestone, and those -- the Bridgestone and Firestone stores are aware of the plaintiffs in this case supposedly, although they don't allege it, supposedly got their single items of AVRP.

This is important, Your Honor, because the

plaintiffs themselves do not contest that there are intervening sales to any dependent non-Bridgestone entities. If you look at Mr. Hansel's affidavit, his declaration in support of the Rule 56(d) discovery, he basically says that -- he contests -- he says we are not sure whether Bridgestone owns the Firestone stores but he does not contest the undisputed Ohira declaration that says Bridgestone only sells AVRP to OEMs and tier one suppliers. There is nothing in Mr. Hansel's affidavit that questions that fact, and that fact dispositively proves that the defendants -- I'm sorry, that the plaintiffs lack antitrust standing under Illinois Brick. Again, dispositive, end of the case.

Now, and I don't think we ever have to get here, Your Honor, but just to show just how -- you know, at some level I have to give the plaintiffs' counsel credit for their creativity, right. They couldn't get a real plaintiff here, they couldn't get a real direct purchaser, the day before they get something the best they could do, and they try to -- you know, they try to gin up a complaint.

But with respect to the class allegations, this complaint in and of itself has such incredible structural problems that even beyond the 12(b)(1) jurisdictional issue and the 12(b)(6) antitrust standing issue, you can never have a class the way they proposed it. Their proposed class is all direct purchasers of anti-vibrational rubber parts

excluding the defendants and their past, present parents, subsidiaries, affiliates and joint ventures in the United States from any of the defendants or their controlled subsidiaries, affiliates, joint ventures or entities of which they are the ultimate parent during the class period. As I have noted, Your Honor, there is no other class that's like this.

And here is the problem with the class as they have defined it. Now we will just use an example. Take Bridgestone who sells anti-vibration rubber parts for the 2006 Toyota Camry, they sell those parts to Toyota. Toyota is indisputably their direct purchaser, that's who bought the parts from Bridgestone. Toyota sells these AVRP parts to its dealership. The dealership is an indirect purchaser, and they are part of the auto dealer indirect purchaser class actions. Those folks are taken care of in that case.

The dealerships then sell the parts, because they do, to auto parts distributors, yet a second transaction unrelated to Bridgestone, and those auto parts distributors they are indirect purchasers, and they are probably covered by the other indirect purchaser actions including the EPP actions. The auto parts distributors sell parts to Firestone, totally independent from Bridgestone, have nothing to do with Bridgestone. Firestone is actually itself an indirect purchaser. They are the indirect purchaser number

three. They then sell the part, single part, to the supposed direct purchasers in this case who are the indirect purchasers number four. Notice the inherent and unavoidable conflict that exists because of the plaintiffs' class definition.

Toyota is a direct purchaser, the direct purchaser, but under their definition the supposed direct purchaser plaintiff in this case, really an indirect purchaser at best, is also a direct purchaser. There is an inter-class conflict here, and it exists because of their class definition, they can't avoid it. You can't certify a class on that basis.

And the notion that those four tier indirect purchasers could be adequate class representatives for Toyota, the OEMs, the tier ones, Your Honor, belies credulity, it can't possibly be the case even apart from the inherent conflict that their class definition compels.

Thank you, Your Honor. I may have a rebuttal.

THE COURT: Response?

MR. FINK: Thank you, Your Honor. David Fink on behalf of the plaintiffs.

Actually I would like to ask for a courtesy from defendants; if you wouldn't mind, I'm going to go through your PowerPoint, so if you would just put up the first page of the PowerPoint.

Before we get to this, Your Honor, I thought it

would be helpful to just go in the same order they went in, and we can cover the issues.

THE COURT: I agree.

MR. FINK: But before we get there I want to stay a couple things as an overview related to this argument, and that is what we just heard was very persuasive and would be a terrific closing argument, and I look forward to hearing it as a closing argument several years from now when this case comes up for trial. But for now we have to keep in mind that we are at the very outset of the case, we are at the pleading stage, we are nowhere near the point at which most of the arguments you heard can or should be considered by the Court.

In one sense -- and I'm going get to that PowerPoint and go through it, but in one sense this case is really very simple, the argument is very simple, and the motion, I hesitate to say this, but isn't that interesting because what we have here is a case in which we have pled that certain named plaintiffs each purchased a price-fixed product, in this case it was the anti-vibration rubber parts, but each plaintiff purchased a price-fixed product and we allege directly from a participant in the conspiracy. And now it is --

THE COURT: Who did they purchase it from?

MR. FINK: They purchased it from an entity wholly owned --

THE COURT: Who?

MR. FINK: Well, Your Honor, they were purchased -- counsel is incorrect when he says the only possibility is Firestone.

THE COURT: No, I'm just curious, I want to know what do your plaintiffs say who did they purchase it from?

MR. FINK: They were purchased from a couple of different stores, there's Firestone retail stores but there is also Tires Plus retail stores and Wheel Works, those three types of retailers are all identified by Bridgestone as being part of their integrated family. Bridgestone prides itself publicly on being a fully-integrated company from the Indonesian rubber fields to the service store in your backyard, and that's how they present themselves.

THE COURT: Do they own tire -- is Tire Plus an independent -- excuse me, a subsidiary owned by --

MR. FINK: Perfect question, Your Honor. What they are, and it is fascinating because in their briefs they referred to this attenuated connection, they talk about it as indirect, in their -- in the affidavits they use the word indirect a lot, but here's what is indirect: Firestone owns a company that owns a company that owns the tire stores. There's nobody else involved. Bridgestone, Bridgestone, Bridgestone, Firestone, it is that simple. It's not complicated, there aren't other parties involved. It is

all -- they can't deny it, they won't try to deny it. The ultimate owner, and that's the term that we use, we refer to -- again, I was saying before that they purchase a price-fixed product directly from a participant or an entity owned by a participant. The ultimate parent is Bridgestone.

Now, interestingly enough, Your Honor, what's fascinating about this is we didn't plead any of that, we pled what we had to plead, it is notice pleading, we pled what we had to plead. There is no heightened pleading requirement for antitrust but we pled what we had to plead, and we pled that they purchased from an entity whose ultimate parent is a defendant. We never used the word Firestone. And yet they do their whole presentation, they argue their whole brief, they knew exactly what we were talking about, there was never any question.

Now they got a little confused because they said it could only be Firestone, but they haven't done apparently all of their homework and didn't realize that their company actually owns three different -- it is on their website but the company owns three different types of retail stores.

THE COURT: What's on their website?

MR. FINK: That there are three different types, the Firestone Complete Auto Care, Tires Plus and Wheel Works, the different brand names.

THE COURT: That they own?

MR. FINK: They own, yes. Ultimately -- ultimately Bridgestone owns.

THE COURT: I'm a little worried about this ultimate so I'm trying to get through that.

MR. FINK: Good, then I should be more clear. Bridgestone Corporation, and they acknowledge this in their affidavits, the Ohira affidavit, which is Exhibit A, Bridgestone owns -- wholly owns an entity that they call BAPM, Bridgestone APM Company. And they do -- there is a lot of fun in the way that they plead, they kept telling you defendants never sell directly. Well, that's true the defendants that are named don't, it is the party they own that does.

They say, for example, in the Ohira affidavit at paragraph 8, BAPM and BSJ has never sold anti-vibration rubber parts to retail stores, et cetera, et cetera, but they don't tell us who does. They know presumably but they never tell us who does, but we don't have to prove that. What we have to prove is a member of the conspiracy or someone owned by a member of the conspiracy has sold directly to a plaintiff a price-fixed part that was fixed through the conspiracy.

Now, there's plenty of proof from here to there, we may not be able to prove our case, but we pled our case and that's what matters. So I --

THE COURT: What about -- what about what they say, and if I'm going ahead of you just let me know because I know you are going to go over this, but the diagram, I am interested in the diagram, which is kind of at the end of their --

MR. FINK: Do you want to jump ahead to that, Your Honor? I mean --

THE COURT: Well, because you are saying that Bridgestone owns BAPM.

MR. FINK: That's correct, and they --

THE COURT: And that it is not contested.

MR. FINK: -- don't deny that.

Your Honor, here is what is interesting, our diagram on the left they call plaintiffs' speculation, and, in fact, they have a footnote where they call us out because the last item is retail consumers as though we are saying that Bridgestone owns the retail consumers. Hardly the case. Bridgestone BSJ owns Bridgestone Americas, Inc. Bridgestone Americas, Inc. owns Bridgestone retail operations. I apologize earlier when I was running through the breakdown I stopped at that point, I should have continued. You see, Bridgestone retail operations, which is also BSRO is usually the abbreviation or BSRO/Firestone is the abbreviation people have been using, that entity, that third entity, owns all of the these -- we don't know if they

are all because they say there are some franchises but there's 2,200 stores in the United States, that's what they say on their website, they've got 2,200, 2,200 stores. And then they say in their pleadings well, some of them might be franchises. Well, maybe some are and the proofs could turn out that we didn't -- that one of our clients didn't purchase from an entity owned by Firestone, but that's a proof, that's not a pleading issue, that's a proof issue.

Now, what they -- this is fascinating because this chart says plaintiffs' speculation and then on the right it says factual record. Well, that's a great title except it is not true because the only record that exists here that they claim they have is two things, one, their affidavits which are inconsistent internally and I'm going to talk about that, that's why the factual record is not clear at all.

And the second thing is, and they never acknowledge this, but we attach nine exhibits to our response and those exhibits almost all are Firestone or Bridgestone documents in which they very clearly talk about the integrated -- Exhibit 1, they talk about BSRO, and again that's that reference, BSRO is headquartered in Bloomington, Illinois, operates the largest network of company-owned automotive service providers in the world, nearly 2,200 tire and vehicle service centers across the United States including Firestone Complete Auto Care, Tires Plus and Wheel Works.

THE COURT: Slow down, please, so we can --

MR. FINK: I'm sorry, and I want to particularly apologize to Rob. I will be more careful when I read.

So in our first exhibit we point out that they publicly acknowledge that ownership. Other exhibits explain that vertically the group's operations extend through the supply chain from upstream where raw materials are produced inhouse to downstream retail networks.

And the third exhibit -- again, these are their documents taken off of the internet -- Bridgestone will emphasize uniformity in all resources held within Bridgestone and strengthen and effectively utilize vertical integration. That's the term over and over again, vertical integration, from the rubber fields to your car.

They say in Exhibit 4 the Bridgestone group is one of the most vertically integrated companies in the tire industry internally producing many of the raw and intermediate materials used in the development and manufacturing of its strategic tire products.

They talk about the Indonesian rubber fields. I didn't make that up, I was just amused by it.

Their corporate social responsibility report in 2012 included the Bridgestone group is characterized by not only the vertical -- horizontal expansion of its global operations but also the vertical integration -- I'm sorry,

the vertical expansion of the supply chain that extends from the natural rubber farms that lie upstream to the sales channel network downstream. Vertical expansion confirms one of the groups' most important competitive advantages by fostering innovation through the utilization of knowledge and expertise at all levels of the operation.

And then some words from the chairman and CEO and president, which is Exhibit 7. In my view, he says, vertical integration remains one of our greatest operational strengths.

Now, Your Honor, don't misunderstand us, that's not what our whole case is about but that's how we found this, that's how we learned that there were retail operations owned by the defendant -- at least one of the defendants selling direct to consumers.

Now they try to play some games and mince words here and there. For example, there is an affidavit from a fellow named Jerry Schuster, who is -- they say is employed by BSRO or Firestone. And one of the things that he tells us is that Firestone stores occasionally -- I'm sorry, I have to back up. He starts to say in paragraph 6 of his affidavit Firestone stores do not sell anti-vibration rubber parts to retail consumers over the counter. That's pretty definitive, that would suggest we couldn't possibly have a case, except that he goes on to say Firestone stores occasionally, as

though that makes a difference, occasionally purchase anti-vibration rubber parts to install in a retail consumer's vehicle as a replacement part. So, in other words, what he said was we won't sell them to you over the counter --

THE COURT REPORTER: Slow down, please.

MR. FINK: I'm sorry.

We won't sell them to you over the counter, but what we will do is we will sell them and install them in your car for you with a labor charge and a parts charge. We have all been there, we have all seen it. And all we are saying is the parts charge was inflated as part of this conspiracy, that's all this is about.

THE COURT: What about the other defendants, not Bridgestone?

MR. FINK: Right, the other defendants are parties to the price-fixing conspiracy. If one party decided to set high prices and the others didn't cooperate the competition would bring the prices down. So they all pled -- I shouldn't say they all have, I'm not positive about that, but there have been several guilty pleas and there clearly is a global conspiracy to fix the prices of anti-vibration rubber parts.

Bridgestone gets special attention in this because they had previously plead guilty to a different price-fixing complaint and failed to notify the Justice Department about this other price fixing they were doing, and that's why they

got such an enormous fine in this case, over $400 million. But as far as the other defendants, they had to work together because it is just that, it is a cartel where the parties in the cartel have to all work together, and they are most if not all of the market for, or suppliers of, internationally of anti-vibration rubber parts.

So they are on the hook because their co-defendant sold these products directly. By the way, this applies to virtually all the cases. You won't find that there is a plaintiff for every defendant, but there is a conspiracy that ties every defendant to every plaintiff, so that's how the others are responsible.

Your Honor, back to this chart. On this chart they claim that there is a -- that this is the factual record, so let's go to the next page. Can you show the next page -- oh, oh, wait, I'm sorry, before we do that. Real quickly what they are showing here, what they say they are showing here is see Bridgestone is still here and the retail operations are still here, but they say in the middle there must -- there absolutely must have been a sale to a third party who then sold to another third party but it is speculation, they don't know that. They say that but they don't know that.

So next screen, if you don't mind calling up the next one in your exhibit, because this is how they were proving it out, it might be helpful to look at it that way.

On the right is Mr. Ohira's affidavit, the fellow I was just referring to before, but it is almost as interesting to see what he says as what he doesn't say. For example, he says BAPM and BSJ manufacture anti-vibration rubber parts and sell those parts to certain OEMs in their suppliers, period. Okay. That's what that says. But it doesn't say exclusively.

And -- sorry, excuse the noise. You will see a fascinating contrast because when you look at the affidavits, here, here is another one, the affidavit, it is Exhibit C of their motion, is a declaration of an individual with Toyo Automotive Parts. Now in his affidavit, paragraph 7 says to the extent that anti-vibration rubber parts are sold by Toyo for repair or replacement -- I'm sorry, for repair or replacement, they are sold exclusively to the OEMs and their tier one suppliers located in North America.

The lawyers were as careful as they can be, and I respect that, they had to be careful, but they couldn't get Mr. Ohira to sign the declaration that said exclusively. They were able to get Mr. Saki to do it, different company.

Now, Your Honor, this affidavit says in bold, strong and definite, BAPM and BSJ have never sold anti-vibration rubber parts to retail consumers. That's true, we never said they did, but what he doesn't say is that BSRO Firestone have never sold anti-vibration rubber parts to

retail consumers and he doesn't say it because it isn't true, it just isn't true.

So the -- what's here -- what's posted there isn't quite as interesting as what is missing there. So, for example, paragraph 10 of his affidavit, which they don't offer you, but obviously they have presented it to the Court previously, says BAPM does not own, operate, or control any retail stores, repair shops or other entities that may sell anti-vibration rubber parts to retail consumers. Note the use of may, they use that a lot even though their website says they sell these things.

By the way, that was the next two exhibits which I didn't go, Exhibits 8 and 9 are advertisements essentially talking about how they sell bushings, which are anti-vibration rubber parts. But even in their affidavit they only say they may sell them, but what is fascinating is he says BAPM does not but, of course, he can't say BSRO Firestone does not, they do.

Now, here is the basic concept, Your Honor, and the reason this is so fundamentally important, and they miss the point completely. They talk about control, and that there is no Sixth Circuit case that has ever found control as the exception. We are not arguing strictly control, we're talking about ownership. And the only case that they cite, the case by the way that says that no Sixth Circuit case has

found control was a case decided across the hall from here in a courtroom that I spent far too many hours with Judge Cox, and I don't mean to be unfair to Judge Cox, he spent too many hours with me too, but it was the Refrigerant Compressors antitrust litigation, that's the case they cite. Now, we had a class case but in the class case GE opted out.

So the case they cite to the Court for their control argument is GE coming to -- with their claim after they opted out and Dan Voss, one of the defendants in this case, arguing GE purchased a very large volume of refrigerant compressors and most were purchased directly by GE but some purchases that GE claimed they should get credit for that GE was trying to collect damages for, some of those purchases were by an entity that GE did not own. GE said they controlled the entity.

And what Judge Cox explained in his opinion was GE owned less than 49 percent of the company, or maybe it was 49, less than 50 percent of the company, GE had a director or two on the board of directors, but GE didn't provide substantial allegations to prove that they really controlled this third-party purchaser so that GE should get credit for their purchasers. That's not this case. That's a control case. We are dealing with 100 percent ownership case.

And now to get back to how it works. Let's say I am a price-fixing corporation. Corporations can be people

now, right? So I'm a price-fixing corporation. I enter into a conspiracy with three other price-fixing corporations but I don't want to get caught with the direct purchasers so what I do is I create company B. Company B is wholly owned by me. The price fixers are all in my company A, but company B is this new company I've created, and company B handles all of the sales of my price-fixed product. I own them but they are not me.

So by interposing a corporate entity between me and the purchaser I am able -- at least based on their argument, I would be able to sidestep the entire direct purchasing exposure. I would be able to claim Illinois Brick, and that's why Illinois Brick had an exception, and it said it right in there that there was an exception for controlled or owned companies whose ownership or control supersedes the market. And that's what this is about, it is about superseding the marketplace.

So there is no subtlety here though, Your Honor, we know we have some facts to prove, we have some evidence to present, we have a lot of discovery to do because they don't even know internally where they stand, and we have a lot of information to get, but that's way down the road, that's not here.

So I would like to go to the beginning of this, if we could. If you don't mind go to the first one -- you can

go to the date one. Okay.

Your Honor, before I became a fancy, sophisticated antitrust class-action lawyer I used to just be a personal injury lawyer occasionally, and I've been in a lot of courtrooms and I know this Court has also where a lot of people --

THE COURT: No, I've only been in my own.

MR. FINK: Well, I've been in those too. I don't think I've ever heard anybody argue an almost statute of limitations claim. What we are being told is the statute was going to run on November 16th, it's probably true, I don't know, the statute was going to run on November 16th and so we filed on November 15th, ergo weak claim.

Your Honor, some of best claims I've ever had was filed the day before the statute ran, and it's not an accident either. You build your case, you get as much information as you can, you do your best, and you get the very best plaintiff that you can but then you file before the statute runs. Where I come from being told that you file the day before the statute runs is a compliment, it's not an insult, but my feelings notwithstanding, this doesn't mean anything at all.

And what else doesn't mean anything at all is that the end-payor plaintiffs and the auto-dealer plaintiffs filed sooner, and there's no subtlety, there's no mystery. You

want to get a plaintiff -- an end-payor plaintiff, throw a rock at any street and you are going to hit one. The auto dealers, it is the same plaintiffs in all the cases. What happens for the direct purchasers is we need to find someone who directly purchased from one of the participants in the conspiracy and in some instances it's easier than in others.

In this case the question isn't why did we file when we did, the question is when we filed what did we file, and did we meet the legal requirements.

So let's go to the next page, I don't remember what it is but let's go to the next page. Okay.

Now this is really fascinating, Your Honor. I know the Court listens closely and so I'm sure the Court heard this repeatedly, at the end of so many of the things that learned counsel said was the phrase in the auto parts cases. This is unprecedented in the auto parts cases. This has never been before done in the auto parts cases. What you don't find in their brief is very much case law, and the reason you don't find very much case law is there isn't case law to support some of the unusual allegations that they make.

So right here they say in the other DPP complaints the plaintiffs are corporate entities but in ours the plaintiffs are individuals. So what. They either are or are not direct purchasers, it is that simple. It doesn't matter

if they are corporations, non-profits or individuals or governments, they happen to be individuals.

In all other DPP complaints the plaintiffs allege that parts were made by the defendants. In here it says we do not allege that the AVRPs were made by the defendants. There is nothing that says that the products that you price fixed you had to make, and even if it did we've made our allegations.

Now, as far as this is concerned I do want to point one other thing out though, their briefs make it clear that they don't know who made the AVRPs, and it is important, there is a reason. The AVRPs are indistinguishable one from another, that is the manufacturer is indistinguishable one from another, you can't brand them or at least they don't brand them, that's why price fixing works, and that's why price fixing is necessary. If these weren't commodity products that are fungible and easily changed from one company to another, you can't even tell what company it is, the price fix wouldn't work. Price fixing -- it wouldn't be necessary, I mean, because you set a price, someone just undercuts you, they keep undercutting you, so that's why they had to -- why they had to conspire to fix the prices. They can't tell us, and they say right in there it would take substantial discovery to figure out, I don't know the exact page, but it would take substantial discovery to figure out

whose product was actually sold by what they call the Firestone stores. Again, it is not just Firestone but we will accept Firestone.

Now, I love this, plaintiffs concede -- they say in the others plaintiffs allege they purchased parts directly from defendants and then they say plaintiffs concede they did not purchase AVRPs directly from defendants. No, we purchased them from a direct subsidiary of a defendant. It is the ultimate parent of the party that we -- of the party that we purchased the product from. This isn't new law, it is not interesting law, it is very straightforward.

And incidentally we quote from several class definitions in various cases, some in this building, the Packaged Ice case for example, but we cite from several different cases where the class definition includes purchases from defendants, their subsidiaries, et cetera, et cetera, that aren't wholly owned. So this isn't -- this doesn't change anything except we know we've got some proof issues that we don't have in the other cases which we will prove.

Plaintiffs identify the entities that sold them their parts. Well, that isn't actually true. They say all other DPP complaints do that, they don't do that, some of them had, some of them didn't. And, in fact, in the heater control panels case this Court looked at the allegations because in that case defendants came in and said you've got

to be more specific about where you've purchased it, who you purchased it from, et cetera, and the Court said no, there is no heightened pleading requirement in antitrust, you pled that you purchased it, you pled that you purchased it from a participant in the conspiracy, you don't have to tell us who. The time will come when we will have to say who or we won't win the case.

Oh, then, yeah, the last one is the proposed class definition which I just talked about, which our definition includes entities which defendants are the ultimate parent.

I am not sure, by the way, that we are not going to ask for that when we come with class definitions in other cases. The fact that you put a definition in the complaint doesn't constrain you by it -- to it, and my best guess is that when we come in in any other parts where we actually are going to be seeking class certification sooner my guess is we will add some language to that effect.

Okay. Can I see the next page?

Well, I won't waste a lot of time on this page, Your Honor, because it just sort of cries out for so what. The indirect -- by the way, the indirect purchaser complaints initially included some of these types of purchases and then they took them out as I understand, it is not relevant to what's going on here, but it makes no difference if our allegations are overlapping, they are our allegations. We

could have filed an identical complaint. We've all seen them; you just take them off the shelf, there's plenty of complaints. We didn't do that, but they managed to find two or three specific allegations that are the same in the indirect complaint and the direct complaint, and while it is a kind of a interesting rhetorical point it means absolutely nothing here. The only question here is did we state that we have a plaintiff who directly purchased a price-fixed product from somebody who was either a member of the conspiracy or the ultimate -- or whose ultimate parent is a member of the conspiracy.

Let me get myself oriented here with the next page.

Oh, okay, that was just the introductory stuff. So let's get down to the theories. And this is really interest before we even get there, Your Honor, and that is -- I know I said it wasn't interesting but I get interested when we start arguing. This is a Rule 56 motion in search of a shortcut. They have brought it as four Rule 12 motions; 12(b)(1), which we are going to talk about first, the 12(b)(6), the 12(d), and the 12(f). And they try desperately to shoehorn -- at the pleading stage to shoehorn this case into one of these areas where the Court should dismiss based on pleadings, but this isn't a case that should be dismissed on the pleadings, it doesn't work; there are disputed facts, there are disputed issues, but let's get there.

Okay. The next page I think is an introductory thing. Okay. So I will like to see the next page.

This -- the first legal theory is 12(b)(1), and under 12(b)(1) they talk about what our burden is. And if you don't mind we can go to the next page, it will be easier to me, and we may come back. Okay. I'm sorry, one more page and then we will come back. One more page. I'm sorry.

Your Honor, they cite the Gentak case. That's a very important case.

You can go back to the first one in the section.

Gentak was decided by Judge Guy, and he set forth some very clear principles for the Sixth Circuit for 12(b)(1) motions. And the overriding principle, and I'm going to -- this is not a direct quote, it may not even be a proper paraphrase, but the overriding principle is that these are the exception, not the rule. Generally speaking 12(b)(1) is not how we address the cases at the outset, and here's why. There are two ways -- two different ways, according to Judge Guy, that you can address jurisdiction, one is facial and the other is factual. As far as the facial argument, it is really comparable to a 12(b)(6) although it's said that 12(b)(6) is more easily applied, and that is do they plead jurisdiction, and if we don't plead jurisdiction we're out.

So if we had filed this case -- well, I can't think of a good example here because we belong in federal court,

but if you file a case and you don't make any allegations that meet federal jurisdiction you can get out facially under 12(b)(1). But importantly, very importantly, if you bring a factual claim -- if your 12(b)(1) claim is factual, then Judge Guy explained that a district court engages in a factual inquiry regarding the complaint's allegations only when the facts necessary to sustain jurisdiction do not implicate the merits of the case, and that's exactly this situation.

Their claim is that we can't win on the merits and therefore there is no jurisdiction, and Judge Guy was very clear in saying you don't mix the two up, if it is really about the merits of the case, if that's the factual issue, then you've got to steer clear. And the exception -- the only exception that he made to that was if something was clearly immaterial, made solely for the purpose of obtaining jurisdiction or wholly unsubstantiated and frivolous.

But let's go back first though to facial, the facial attack. This Court has really addressed that already. I refer to the heater control panels' case, it is not the only one but it is the one I read most recently. In the heater control panels' case the plaintiffs allege simply that they purchased heater control panels directly from one or more of the defendants and the defendants' conspiracy impacted the prices that they paid for the heater control

panels. This Court found that that was enough, that that set out a satisfactory basis for the case to go forward.

And I quoted from it already off the top of my head a few minutes ago so I'm not going to repeat too much, but what was important was that the Court said there here direct-purchaser plaintiffs alleged that will they purchased heater control panels directly from one or more defendants and/or their co-conspirators during the relevant time period and they have satisfied their pleading burden. Very straight forward.

We pled a little more than that in this case, but they claim -- they say -- and now back to their PowerPoint, the only standing allegation is that plaintiffs purchased AVRPs directory from an entity which one of their defendants is the ultimate parent. That's right, that's all we had to say. We said a lot more but that's all we had to say. They say there is no allegation that they made the AVRPs; there is no requirement that we say that they made them. They say there is no allegation that we sold them to individual consumers; no, the defendants didn't sell them to individual consumers, the company they owned, one of them owned did. They say there is no allegation about how we purchased the AVRPs; that exact issue was addressed in heater control panels and the Court said you don't have to tell us exactly how you purchased it, not yet, eventually you will have to

but not yet. No allegation that they even purchased them from the Firestone repair store; and that was the one that gave me sort of a smile because they may not have been from a Firestone repair store, it might have been from Tires Plus, it might have been from Wheel Works, but we did say it was from somebody that's owned by one of you, and it is the old story somebody had a guilty conscious because we never said who it was and Bridgestone got up and said it is not us, it is not us, but it is them.

And we didn't know when we filed that Toyo doesn't own any entity that owns any entity that owns tire stores, apparently they don't but Bridgestone does, and that was exactly where our plaintiffs went.

I've got to point out the last line, it says such a speculative standing allegation is -- bold letters -- unprecedented -- small letters -- in the auto parts cases. It doesn't mean anything that it is unprecedented in the auto parts cases, that's just fun to hear. What it matters is if it were unprecedented in antitrust law and it is not unprecedented in antitrust law. Complaints much thinner than this get past the early stages.

Okay. Can I see the next screen?

MR. REISS: We're going to start billing you for this.

MR. FINK: That's not a problem, that's not a

problem, but I would like you to tell me exactly what the code is so I can use it.

Okay. They say based on the uncontroverted factual record we failed to demonstrate that we have Constitutional standing. Well, you can say uncontroverted, they say it in their pleadings a couple times, but it is very controverted. As I've talked about the attachments I wasn't really planning on going through all nine of them, but as I talk about the attachments you can see it is controverted and it is controverted internally in some of their affidavits. Okay.

They say under Sixth Circuit law -- well, you know, I've already -- I can spend a little time on it but it doesn't make any sense because that's the Gentak case, which I do want the Court to look at. The closer the Court looks at the Gentak case the happier we will be because Gentak tells you 12(b)(1) is not the place to have this case go away.

They say they've submitted five -- I love this. They have submitted five factual declarations showing that they do not sell AVRPs to individual consumers. That's right, but what they don't say is no entity of which they are the ultimate parent sells AVRPs to individual consumers, and the reason they don't is because they can't because it is true that they do.

They say we didn't submit factual evidence and we

didn't move for limited jurisdiction. We don't need any discovery, we don't need jurisdictional discovery. The facts here are clear enough that at least we got past jurisdiction. And to say it is uncontroverted again, it is controverted internally.

I won't waste the Court's time or the time of the people behind me who have started coughing more by going through every detail. I will tell you that in our brief we dissect these affidavits a little bit and point out there are so many inconsistencies but it is not just the inconsistencies, it is the missing pieces, it is the things that aren't said. They don't tell us really where the products are from. They don't tell us who really manufactured the products that were sold because they say they don't know, but they also say -- and I guess I will quote from my single favorite in that regard, I believe it was in the Schuster affidavit, yes, the Schuster affidavit. Okay.

In the Schuster affidavit, which is their Exhibit E, paragraph 7, talks about -- it says the car dealerships, distributors, et cetera, and/or other third parties, there's a great term, this is supposed to be the ultimate evidence. So and/or other third parties from whom a Firestone store may purchase. Again, they don't say they do or they can't or they don't, they just say they may purchase

an anti-vibration part, sell auto parts that are manufactured by many different auto parts suppliers including they say -- he says entities that are not defendants in this action, and that's true because the Firestone stores aren't defendants in this action.

This is my -- this is the line, I promised you something I enjoyed. Sorry. Thus, he says, it is highly possible that an anti-vibration rubber part that a Firestone store purchases and installs in a retail consumer's vehicle was not manufactured by BAPM, BSJ or any other defendant in this action. Based on them telling us in their one affidavit -- only two of these affidavits are actually Bridgestone people, but in this one affidavit they tell us that it is highly possible that we are wrong. I think that's a little like the weather when they say mostly cloudily that means it's partly sunny. So if it is highly possible I think it is mostly likely the other side. We don't know. They are not telling us. They can't tell us because there hasn't been any discovery. This is the pleading stage.

Can we go on to the next? I will move a little bit more quickly although I won't talk a little bit more quickly.

Okay. Again, the same issues, they are saying that they don't sell -- the Bridgestone named defendants don't sell AVRPs to Bridgestone repair stores. They don't tell us whether they sell them to BSRO, they don't tell us whether

BSRO sells directly because that's not a named defendant.

They say they have no knowledge or control over any subsequent sales. Well, here is the problem. They talk about this grand integration that they have from rubber plantation to your car. Well, are we really supposed to believe and do we have to believe their assertion that once a third party gets in the middle we are done and we are suppose to believe that with 2,200 tire stores -- almost 2,200 tire stores in the United States that they manufacture a product, sell it to a third party at arm's length, let that third party mark it up to their wholly-owned subsidiary, make a profit, and then sell it to a consumer. That's not plausible.

Discovery will tell us what's right. Discovery will tell us whether they are telling the truth on their website, whether they are telling the truth in their public disclosures or whether they are telling the partial truth at least in these affidavits but we need discovery for that, it is way down the road.

Okay. Let's go on to the next one. Okay. Good. Now -- we can go to the next page.

Now we are talking about Illinois Brick, and this is their 12(b)(6) motion on Illinois Brick. Well, the problem with their 12(b)(6) motion on Illinois Brick is that we plead it right, they just don't like our facts and that

doesn't make for 12(b)(6). They say the complaint alleges that we purchased AVRPs from an entity other than defendants, and they seem to believe that that means the story is over, but it's not. They say we concede that we are indirect purchasers, not at all. What we concede is that we took their corporate structure, accepted it and bought from one of the defendants three corporate levels separated but 100 percent ownership at every level. They could put ten more levels in between there and it wouldn't make it any difference. You still have a defendant who wholly owns a party, and that party that they wholly own is selling price-fixed products to consumers. That's all we argue, and that's not indirect, that's direct.

Can we see the next page?

This we've talked about already I think and so I want spend a lot of time on it because this is the ownership or control, and in answer to the Court's early questions I explained that they have just turned it on its head. It is not just control, we actually are dealing with 100 percent ownership. 100 percent ownership is 100 percent control. We don't have to prove anything out. The case they cite -- the only case they cite was based upon the GE situation where they didn't prove out that they had control as a purchaser, they didn't control the other entity, that's all, that's not our situation.

The next one, please.

Okay. And we've talked about this page already again. Here the issue on this page is that the factual record is not what they claim it to be, it is not as simple as they say. We've got some very important questions. But one thing that's not a question is did the entity at the top own the entity at the bottom, and did the entity at the bottom -- and was the entity at the top part of the conspiracy? They were. And as the entity at the bottom did they sell it to third parties.

Now they are going to try to prove intervening sales and they might succeed, but they haven't yet. And the fact is that we are allowed to challenge their witnesses who give these mealy mouth -- and I respect counsel, I'm talking about the witnesses, they give some mealy-mouthed inconsistent -- and I'm sure they would be more consistent if the lawyers could have persuaded them, but their affidavits never get to the point. They never say that none of Bridgestone's products were sold out of Firestone stores to ultimate consumers. They don't say it because they can't say it because it is isn't true. Excuse the double negative.

It is true that Bridgestone products were sold in Firestone stores, in Tires Plus stores, in Wheel Works stores, and they were sold to ultimate consumers. Now they may argue later, well, the prices weren't fixed to them, we

only fixed them to other -- well, fine, we will have another argument about that but they have to get their first, and we have a right to go through the proofs to get there.

Can I see the next page? Well, we have talked about this already, I won't --

THE COURT: Okay. We've got to move on.

MR. FINK: Good. Okay.

THE COURT: I am going to give you a minute to sum up.

MR. FINK: Can I see the next page? This way I will be sure I've covered everything, and it really doesn't take much long -- oh, it definitely doesn't take much longer. Okay.

Here you talk about trying to shoehorn something into the wrong rule. This they call a motion to strike. Your Honor, as we all know, in a motion to strike we expect to hear somebody talk about redundant, immaterial, scandalous. None of that is here. All they are saying is they don't think we've got a good class rep.

Can we see the next screen?

They don't like our class rep. Your Honor, it's not time for a Rule 23 consideration. It's not time for a Rule 56 consideration. But their emphasis again is they look at our class definition and they say this expanded --

THE COURT REPORTER: I'm sorry. Slow down.

MR. FINK: I'm sorry. God, Rob, and I think of you as a friend.

This expanded proposed class definition is unprecedented in the auto parts cases and is only in the AVRP case. That's right, we didn't -- we didn't use this definition on the other pleadings. It doesn't matter, it means absolutely nothing.

Can we go to the next screen?

Because the fact is when the time comes -- and I don't need this, we will skip this and we will get done. When the time comes the Court will have to decide what a reasonable class definition is, and there might even be inconsistencies in the class and the Court might change the definition because of it, but in the end -- is there another screen after this?

MR. REISS: Un-un.

MR. FINK: Okay. In the end the determination of whether or not our class representatives are typical of the class or whether representation will be adequate is a very difficult and important decision the Court will make, and they've said to us here and in the pleadings that, well, these individuals they are so different from the OEMs. Your Honor, if I had picked an OEM as my plaintiff or if we had an OEM as our plaintiff they would say but this OEM is in Michigan, and the other OEMs are in California, so they are

atypical. There's always a reason, and the reason that happens is this is a classic case where the defendants take the role of the fox who's telling the Court how to protect the chicken coop. And all we are saying is give us a chance, we will prove our case out, and when the time comes we will show you why our class representatives are typical. And by the way, the reason they are typical is because like every other member of the class they purchased a price-fixed product directly from a defendant or an entity that ultimately is owned by a defendant, and that will make them typical and that will also make them adequate representatives of the class, but you talk about premature, we are nowhere near that consideration.

So, Your Honor, I didn't realize I had gone so long and I apologize, and I thank the Court for its indulgence.

THE COURT: Okay. Thank you.

MR. REISS: Briefly, Your Honor. Since they used my slides I'm going to use their water, if I can.

MR. FINK: We would have poured it for you in advance.

MR. REISS: Your Honor, I will try to be pretty brief. I didn't think it was possible but Mr. Fink has made it clear that their case is even worse than we thought because it is not -- it is not the Firestone stores supposedly, I now understand why they didn't allege who they

purchased from, it is now Tires Plus and Wheels Works which are somewhere even further down the chain that they supposedly purchased from. So I think that Mr. Fink's argument makes it absolutely clear why this case has to be dismissed.

Let me start with one thing that Mr. Fink said and I agree with. He said that the plaintiffs don't need jurisdictional discovery --

THE COURT: Step back from that microphone or move it back.

MR. REISS: I'm sorry, Your Honor.

THE COURT: He said plaintiffs what?

MR. REISS: He said the plaintiffs don't need jurisdictional discovery. We'll take that. Now it is absolutely clear on the record that they are not seeking jurisdictional discovery. Okay. And why is that so critical? By the way, we offered to bring in these affiants in the event they wanted to examine them or question them. They say well, we don't really believe them or they used weasel words, and I'm going to show how none of that is right, but we offered to bring in these declarants, they didn't ask for it, and now Mr. Fink says we don't need jurisdictional discovery, and that's because, Your Honor, these affidavits are so dispositive on both 12(b)(1) and 12(b)(6) that were these affiants here, it would be clear, as

it should be now, what the Court has to do.

Now, the plaintiffs, and this is clear from Mr. Fink's argument, they do not even allege -- and by the way, we are on 12(b)(1), I know they keep on wanting to make this just about pleadings, it is not just about pleadings. 12(b)(1) the Court has to make factual findings, has to, has to under Sixth Circuit law. They do not allege and they have absolutely no basis for alleging that they actually purchased a part made by any of the defendants. They don't allege that. How can they have standing when they don't even allege they purchased a part made by one of the defendants? They are no different from a person on the street. They are no different from a person who bought some Hutchinson AVRP. They are no different. They have absolutely no standing. They can't make the most fundamental claim that a plaintiff has to make which is I bought the product that might be effected by an antitrust conspiracy, and they have admitted in this Court that they can't even make that allegation.

Now, the other thing they absolutely do not contest, and let's go back to the chart slide, this is very important, Your Honor. They do not contest at all that the sales from Bridgestone -- defendant Bridgestone sells only, only, to OEMs and tier ones, and tier ones they sell to auto dealers and parts suppliers, and that is absolutely clear from the affidavits. They try to poo-poo Mr. Ohira's

affidavit.

Let's go to the slide, David, where Mr. Ohira's affidavit is.

THE COURT: Well, they say he doesn't say exclusively.

MR. REISS: Well, Your Honor, I would ask them if he came in here and said exclusively would they agree to dismiss the case, because he would say that. Look at paragraph 5, he says -- by the way I would ask him that, if he says exclusively are you going to agree to dismiss the case?

BAPM, and this is Mr. Ohira, who, by the way, is the president and CEO of BAPM, the U.S. company that makes the AVRP parts. He had previously been for five years the manager of AVRP Strategy globally in Japan at Bridgestone Japan so he knows a lot, and he has been at Bridgestone for 30 years, he knows everything about the AVRP business.

He says BAPM and BSJ manufacture anti-vibration rubber parts and sell those parts to certain OEMs and their suppliers. BAPM and BSJ have absolutely no involvement in, knowledge of, or control over any subsequent sale of anti-vibration rubber parts. And, Your Honor, Bridgestone's business is selling thousands, tens of thousands, millions of anti-vibration rubber parts. They don't sell groups of five, ten parts to stores, that's not their business. You know,

Mr. Fink said well, they are a vertically integrated operation. They are vertically integrated in the sense they have raw materials that they put into tires and stuff, it has nothing to do with how they sell their ultimate product down the chain.

Even more importantly, and Mr. Fink didn't point to paragraph 8 from Mr. Ohira's declaration, BAPM and BSJ have never sold anti-vibration rubber parts to retail stores, repairs shops or other entities that may sell anti-vibration rubber parts to retail consumers including, but not limited to, Bridgestone Retail Operations, LLC d/b/a Firestone Complete Auto Care. Okay. So that's absolutely clear that Bridgestone does not sell. Mr. Fink says, well, I don't believe them. Well, Your Honor, it's too bad, it's not enough, this is a sworn declaration. The fact that he doesn't believe it is meaningless.

On top of that, let's look at Mr. Schuster's declaration. I don't think we have it on the screen but, Your Honor, very, very important, Mr. Fink quoted paragraph 6 of Mr. Schuster's declaration. Mr. Schuster is in charge of purchasing for the Bridgestone retail operations, he's the manager of purchasing. Mr. Fink quoted the first two sentences of paragraph 6, and it is important, Your Honor. He quoted the sentences that said Firestone stores do not sell anti-vibration rubber parts to retail consumers over the

counter. He thought that was somehow meaningful. Firestone stores occasionally purchase anti-vibration rubber parts to install in a retail consumer's vehicle as a replacement part.

Here's the sentences that Mr. Fink did not read in the declaration, paragraph 6. In these instances Firestone stores purchase anti-vibration rubber parts from car dealerships, distributors, e.g., after-market part suppliers and other third parties. Firestone stores do not purchase anti-vibration rubber parts from Bridgestone, BAPM Company, that's BAPM, BSJ, or any other defendant in this action.

Absolutely clear Bridgestone does not sell to these stores and these stores do not purchase from Bridgestone, uncontroverted factual record, they say they don't need jurisdictional discovery, I agree, the case is over.

Now, finally, Your Honor, we have some rebuttal slides, a couple. I promise I will be brief. Mr. Fink said well, you know, there's Sixth Circuit law that says where the factual issue that goes to the merits of the claim and the jurisdictional issues are the same, you take jurisdiction and let the case go ahead. The problem is that principle doesn't apply here. Okay. The issue here that we are claiming is jurisdictional that they can't meet --

THE LAW CLERK: Do you have the rebuttal slides?

THE COURT: No.

MR. REISS: Oh, I'm sorry. I apologize. Are we

okay?

The jurisdictional issue that they -- the jurisdictional issue and the merits issue here are not the same. The merits issue is simply whether plaintiffs purchased -- directly purchased an anti-vibration rubber part that was covered or affected by antitrust conspiracy, that's the merits issue.

The fundamental fact that the plaintiffs can't meet here, which is jurisdictional, is whether plaintiffs directly purchased an AVRP part made by the defendants, and they've already admitted that they don't know. That fundamental fact is jurisdictional and doesn't overlap with the merits issue of whether a potential -- a part potentially made -- a part made by the defendants was affected by the conspiracy.

Now, they cite a couple of Sixth Circuit cases and those cases made clear the distinction that I've just made.

In Gentak the question of whether the plaintiffs purchased the product, Sherwin Williams paint, was not at issue, the issue was whether paint was a, quote, consumer product under the Magnuson-Moss Act, that was the merits issue, but the plaintiffs didn't come in and say we don't know if we purchased Sherwin Williams paint, they said we purchased the relevant product, and the question was what the legal significance of that product was.

In Moore vs. Lafayette, another Sixth Circuit case,

the defendant's hiring of the plaintiff was not in doubt, all right, and the plaintiff, as the Sixth Circuit noted, that the MTA hired plaintiff in 1971 to handle all group life disability and workers' compensation insurance for MTA and its members. What was an issue was whether the plaintiffs was an employee for ERISA purposes.

So in these Sixth Circuit cases the fundamental fact that even let the plaintiff walk into the courthouse door was not an issue. In Gentak they purchased Sherwin Williams Paint and in Moore the person was hired by the company that he was claiming ERISA benefits from.

Here the plaintiffs can't even say they bought a part made by defendant. That's fundamental. They are no different from anybody else on the street.

Now, I think it is clear and I do think Mr. Fink's argument did make clear that effectively their whole point is well, we have alleged that we are direct purchasers, that's enough, that's it. We said the magic word, Sherman Act, direct purchaser, don't look at anything else, Your Honor. Well, Your Honor, we do think that this complaint is -- falls into the category that Mr. Fink acknowledged that even aside from the 12(b)(1) finding the Court has to make on the facts on its face we have a problem with this complaint. And they admit, and this is the law, that you can have a 12(b)(1) challenge where the plaintiffs' claims are clearly immaterial

made solely for the purpose of obtaining jurisdiction or are wholly unsubstantiated and frivolous.

Your Honor, I think that describes this complaint. These are at best -- at best -- at very best wholly distant indirect purchaser claims, wholly distance. The notion that they are direct purchaser claims, and I understand Mr. Fink's pleading with the Court, just accept the pleadings, Your Honor, just like other direct purchaser claims. No, it's not. They are clearly trying to shoehorn a blatantly unmeritorious case into federal jurisdiction, and the Court should not countenance it. Thank you, Your Honor.

THE COURT: Thank you.

MR. RUBIN: Your Honor, may I be heard? You asked a question on other defendants, and on behalf of Yamasa I would like to answer that.

THE COURT: Yes.

MR. RUBIN: And I think that's a key question, Your Honor. Again, for the record, Mike Rubin for Yamasa.

All of plaintiffs' arguments, all the facts that were asserted here, and the speculation about this, that, where it came from, it was a Bridgestone part sold directly through this chain notwithstanding affidavits to the contrary and then eventually making it to the plaintiffs. First off, all of those facts are not in the complaint, so you can throw away all the affidavits, you can throw away everything else,

and just look at the complaint under a normal 12(b)(6) standard and they lose. And here is why they lose, because all of those arguments depend upon an assumption that these plaintiffs when they took their car in for replacement for repair, the parts that were put in there were made by Bridgestone. What if they weren't? First off, they don't allege in their complaints they were made by Bridgestone, they don't allege they were made by any defendant, they don't allege anything, they just say they bought AVRP parts. Could have been parts made by a whole other set of companies that are not sitting here, they are not part of any of this. It could have been made by my client, Yamasa. Let's assume they were.

Well, Yamasa sells to Honda, Honda sells to auto dealers, auto dealers to distributors, distributors then sell to Firestone or one of the other retail shops. In no way and in no circumstances is that ever a direct purchase, that's a fundamental fact that needed to be -- if they really do believe that their clients purchased Bridgestone parts, which he refused to say, he refused to say which store they actually purchased it from, but that was a key point, they can't say whose parts they purchased. They speculate that it could maybe have been a Bridgestone part but speculation is not a basis for a complaint for subject matter jurisdiction or for a 12(b)(6), and because it is missing from the

complaint it kills their complaint and it renders it an indirect purchaser case.

The other piece that he said over and over again was all we have to allege is a price-fixed part, they purchased a price-fixed part. Again, look at the complaint, the complaint says they purchased a part. They left out, as he noted, careful lawyers that they are, accusing us of being careful lawyers, but in their complaint they left out the notion that they purchased price-fixed parts because they don't even know that. It is a wholly speculative chain that they have set up that is in oral argument here and in their opposition that is missing from their complaint.

And what about the other defendants? Well, if it was my client's parts, assume they were even price fixed, the only way they get to these plaintiffs is through Honda, through auto dealers, through distributors, and all through there that is not a direct purchase. Thank you, Your Honor.

THE COURT: Thank you.

MR. FINK: Anybody else arguing?

(No response.)

MR. FINK: Your Honor, I will be very brief.

Super fast in terms of the rebuttal, all I would ask is that the Court actually read the list of the supposed wholly unsubstantial and frivolous claims including that it was filed the day before the statute ran and these are

individual consumers. Again, these aren't things that bar your claim.

In the heater control panels case, the defendants had objected that we didn't plead what prices were paid or from whom the purchasers were made, and the Court said you don't have to do that at this stage, and that's the key to the answer to what we just heard. At this stage of the proceedings we don't have to plead who made the product, what we plead and what we have pled is this is part of a global conspiracy to fix prices. Now, once they fix prices -- and our experts will ultimately explain, that in order to keep the prices fixed what you need to do is make sure that you are not creating your own competition down below and so these parts are marked up with a fixed markup. Now discovery will show us exactly what it is, we don't know right now, but we will find out because these folks are legitimately in the business of making a profit, they are not just giving out anti-vibration rubber parts at these locations.

So at this stage in the proceedings we have alleged everything we need to allege to establish. Apparently there was a suggestion that we didn't say there was price fixing, maybe not in the single paragraph that said what they purchased, but all through the complaint we explained the price fixing, how it occurred, and we absolutely allege that these are price-fixed products, and I don't know how anyone

can read it otherwise.

And also, again, just to get back, there is no heightened pleading requirement and because there is no heightened pleading requirement there is no need for us to provide every excruciating detail. Frankly, I think our complaint is a little longer than it should be.

That said, the last thing I want to comment on is we had a quote from the Schuster affidavit which Mr. Schuster makes a reference that there were no sales -- or no purchases from the other defendants, interesting again, the other defendants, but it doesn't say or from any wholly owned subsidiaries of the those defendants. They are very careful, as they should be, in their choice of words.

At this stage, at the pleading stage, we simply had to make out a claim, establish federal jurisdiction for that claim, and then we'll go forward and we will have a lot of fun with a lot more interesting issues.

Thank you, Your Honor.

THE COURT: Do you have anything else that you want to say?

MR. REISS: I appreciate your patience. I think we are good. We thank you for your attention, Your Honor.

THE COURT: Okay. Thank you very much. The Court will issue an opinion.

THE ATTORNEYS: (Collectively) Thank you, Your

Honor.

THE LAW CLERK: All rise. Court is adjourned.

(Proceedings concluded at 1:12 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of In re: Automotive Parts Antitrust Litigation, Case No. 12-02311, on Tuesday, August 8, 2017.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 08/23/2017

Detroit, Michigan